

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA, HUNTINGTON DIVISION
BEFORE THE HONORABLE ROBERT C. CHAMBERS, JUDGE

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CLAUDE R. KNIGHT and CLAUDIA
STEVENS, individually and as
personal representatives of the
Estate of BETTY ERLINE KNIGHT,
deceased,

Plaintiffs,

vs.

No. 3:15-CV-06424

BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.,

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL PRETRIAL CONFERENCE

MONDAY, OCTOBER 1, 2018, 10:00 A.M.

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For the Plaintiffs: CHILDERS, SCHLUETER & SMITH
1932 North Druid Hills Road
Suite 100
Atlanta, Georgia 30319
BY: C. ANDREW CHILDERS

URY & MOSKOW
883 Black Rock Turnpike
Fairfield, Connecticut 06825
BY: NEAL L. MOSKOW

(Appearances continued next page...)

Reported by: KATHY L. SWINHART, CSR
Official Court Reporter
(304) 528-2244

APPEARANCES (Continued)

For the Defendant:

TUCKER ELLIS
925 Euclid Avenue, Suite 1150
Cleveland, Ohio 44115
BY: JOHN Q. LEWIS

TUCKER ELLIS
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113
BY: MADELINE B. DENNIS

COVINGTON & BURLING
One City Center
850 Tenth Street NW
Washington, D.C. 20001
BY: PHYLLIS ALENE JONES
and NICHOLAS HAILEY
and JESSICA PEREZ

JACKSON KELLY
Post Office Box 553
Charleston, West Virginia 25322
BY: GRETCHEN M. CALLAS

1 HUNTINGTON, WEST VIRGINIA

2 MONDAY, OCTOBER 1, 2018, 9:51 A.M.

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4 THE COURT: Good morning.

5 MR. CHILDERS: Good morning, Your Honor.

6 MS. JONES: Good morning, Your Honor.

7 THE COURT: We'll go off the record. I understand the
8 the parties wanted to bring a matter to the Court's attention.

9 (Off-the-record discussion.)

10 MR. CHILDERS: Sorry. The first person would be
11 Melissa Ann Mobley, M-O-B-L-E-Y. Second is Victoria Lewis
12 Pickavance, P-I-C-K-A-V-A-N-C-E. And the third is Linda Marie
13 Watts, W-A-T-T-S.

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. LEWIS: Thank you.

17 THE COURT: All right. Are we otherwise ready to
18 proceed?

19 MR. CHILDERS: Yes, sir.

20 THE COURT: Great.

21 So here's what I'd like to sort of list as the
22 schedule of the agenda. First I want to hear brief argument
23 and then hopefully rule upon the defendant's motion to
24 preclude certain evidence. Then I want to turn to the
25 deposition issues, first plaintiffs' objections to the

1 defendant's deposition designations, then the defendant's
2 objections to plaintiffs'.

3 After that, I want to go through the proposed voir
4 dire and preliminary instructions. Following that, if there
5 is anything else that needs to be addressed from the joint
6 pretrial order, I want to hear about that.

7 And then the last matter, I have a few relatively
8 minor matters a few minor matters that I want to discuss with
9 you just about logistics, in particular a couple of matters
10 that my court reporter asked that I raise and clarify with the
11 parties.

12 So let's start, then, with the defendant's motion to
13 preclude evidence. I've read all this, I've got a pretty good
14 understanding, but I want to give the parties a chance for
15 some brief argument. Go ahead.

16 MR. LEWIS: Should I do it from here, Your Honor, or
17 do you want me --

18 THE COURT: You can do it from there if you're
19 comfortable. Just make sure you use that microphone so my
20 court reporter can hear it well.

21 MR. LEWIS: Very good. Thank you, Your Honor, for
22 considering the motion.

23 You know, it's really -- I was trying to think of a
24 good analogy on the defense side to really describe what we
25 are moving for because I think there is some confusion based

1 on the papers that I've seen from plaintiffs about what we're
2 really asking for.

3 And so as a defendant, let's assume that the
4 plaintiffs never requested our complaint database at all, just
5 for whatever reason in discovery. And we did get to the
6 trial, and as defendants, we seek to argue in front of the
7 jury that there are no complaints associated with this
8 product. Now just because the plaintiffs have not asked for
9 our complaint database doesn't mean I get to argue a fact that
10 isn't true to the jury or that I can't confirm it's true.
11 That's not appropriate.

12 And if there indeed were complaints about a product,
13 or in fact I didn't even know if there were or not, I still
14 can't argue to the jury there are no complaints associated
15 with that product. I could say, based on what we've
16 collected, or based on the evidence you will hear, there are
17 no complaints associated with that product, but there is a
18 back story there. And there is a big difference between
19 saying it as a fact and saying that, hey, based on the
20 homework we've done, we don't have that evidence.

21 And that's really what we are seeking here with
22 respect to the plaintiffs' use of the warfarin medication. We
23 don't have all of the medical records from the entire time
24 frame that Betty Knight was on warfarin, we just don't.
25 Should the plaintiffs have collected those and produced those

1 to us? Maybe, but let's put that aside for a second. Could
2 we have done it? Maybe, but let's put that aside.

3 We know for a fact that we can't really represent to
4 the jury that in fact Betty Knight had no bleeds with warfarin
5 during the entire time that she had the medication. We can
6 say based on the records we've collected, the plaintiffs can
7 argue this, maybe, maybe there isn't any evidence. We think
8 maybe there is, but we think the jury shouldn't be misled into
9 thinking it's a fact that she did have a bleed while she was
10 taking warfarin.

11 So either we need to preclude the plaintiffs from
12 making that argument and stating that as fact or we need to be
13 able to tell the jury the whole story. We didn't collect all
14 of the information, so we don't know, we're not sure.

15 THE COURT: Well, as I understand it, the plaintiffs'
16 evidence is, first, they have medical records which have been
17 shared, and Dr. MacFarland's comes to mind most readily, where
18 Dr. MacFarland purported as part of the history that there was
19 prior GI bleeds on warfarin.

20 But then it seems that when Dr. MacFarland, and other
21 witnesses who made those entries in their notes, were
22 questioned at deposition, they said, well, we don't really
23 know why that is there. And more or less, if we take the
24 plaintiffs' view of it, they testified that they don't really
25 see a basis for that notation to be there.

1 And then you've got Dr. -- and I'm going to forget how
2 to pronounce the name, your expert?

3 MR. CHILDERS: Ashhab.

4 MR. LEWIS: Ashhab.

5 THE COURT: -- Dr. Ashhab saying, you know, I don't
6 see that she ever had a problem on warfarin, so that was
7 clearly still an alternative that she could have been on.

8 It seems that the evidence is that Dr. MacFarland
9 treated her for was it like six years and had her on Pradaxa
10 for the first three or four of that, and that Dr. MacFarland
11 testified she did not have any significant bleeds from
12 warfarin while. So if they develop that evidence, I don't see
13 how I can keep them from offering that evidence.

14 If you've developed -- so I assume you've
15 cross-examined these people, and there might be some further
16 of discussion that. But whether or not she had a prior bleed
17 on warfarin seems to me to be a question of fact. And
18 although medical records from those first two years might be
19 conclusive about it, nobody has got those records. At this
20 point, I'm not inclined to blame either side for the absence
21 of those records. And so it seems that the plaintiffs have
22 got testimony essentially explaining what is otherwise in the
23 chart from these two doctors, and I think they're entitled to
24 do that.

25 I think you're certainly entitled in your

1 cross-examination of their experts -- if he says she never had
2 a bleed on warfarin, I think you're entitled to probe that and
3 ask about these histories. I don't know what all the
4 testimony was by the various doctors.

5 Are they testifying live? Is MacFarland going to be
6 here live?

7 MR. CHILDERS: That's not our plan, Your Honor.

8 THE COURT: All right. And who was the other -- was
9 it the cardiologist who also --

10 MR. CHILDERS: Dr. Gunnalaugsson also had it in his
11 records and said he didn't actually see --

12 THE COURT: Right.

13 So, I mean, it seems to me that -- I certainly believe
14 you can challenge that, cross-examine him, but I don't believe
15 that it's appropriate for you to blame the plaintiffs for
16 failure of discovery and thereby preclude them from offering
17 their evidence. Nor do I think it's appropriate that you be
18 permitted to argue to the jury as counsel that, well, there
19 was a failure to produce these records.

20 I think you can ask these doctors, have you seen these
21 records, and they're going to say, I guess, no. But I think
22 that's really as far as you can go.

23 MR. LEWIS: Okay. So if there are -- Your Honor, if
24 there are an absence of -- for instance, Dr. Ashhab hasn't
25 seen all of the providers' records during the entire time she

1 was on warfarin. That's fodder for cross-examination.

2 THE COURT: It absolutely is. And I think you can
3 also point out the entries in the charts that purport to be a
4 medical history, which is otherwise admissible anyway, that
5 says she had prior GI bleeds on warfarin --

6 MR. LEWIS: Right.

7 THE COURT: -- and see what his explanation is for
8 concluding that that was inaccurate.

9 MR. LEWIS: Right.

10 THE COURT: I have to admit, I've looked at -- last
11 week, when I looked at some of this discussion in the
12 depositions of MacFarland and Gunnalaugsson, that it wasn't
13 very clear to me what they purported to have seen or
14 concluded. I think it's pretty mushy.

15 But I think all that is evidence for the jury, and I
16 don't think it's appropriate for either counsel to raise this
17 as sort of a discovery criticism of either side because these
18 records aren't there. I think it's fair to ask these
19 witnesses who testify live if they've seen such records. And
20 if they haven't, they haven't, and that can plant the seed of
21 doubt.

22 But I don't think it's appropriate for either side to
23 be arguing that --

24 MR. LEWIS: It's their fault.

25 THE COURT: Yeah, exactly.

1 MR. LEWIS: Okay.

2 THE COURT: So in that sense, then I'm going to deny
3 the motion.

4 MR. LEWIS: That's fair guidance. Thank you, Your
5 Honor.

6 THE COURT: All right. Thank you.

7 All right. Then let's turn to the deposition
8 designations, and I think I said I would start with
9 plaintiffs.

10 I got the reply -- or response, rather, filed by the
11 defendant. I read through it yesterday. I think I've got a
12 pretty fair grasp of the issues, but I do want to give each of
13 you a few minutes to just walk through each of these.

14 So let's start with -- is it Kliwer, is that her
15 name?

16 MR. CHILDERS: Kliwer.

17 THE COURT: Kliwer?

18 MR. CHILDERS: Kliwer actually.

19 THE COURT: Kliwer. All right.

20 So, first, I haven't seen this transcript. I don't
21 know what the document is that was referred to. I know --
22 I've read her deposition transcript, and I understand she was
23 questioned about it, but I don't think I've seen the document.
24 So it's a little hard for me to be sure what it is that she
25 was testifying about that day.

1 MS. JONES: Your Honor, we have a copy of the document
2 itself if that would be of any help.

3 THE COURT: I'd like to see it. I don't know that
4 it --

5 MS. JONES: May I approach?

6 THE COURT: Yes, you may.

7 So I understand Ms. Kliever was sort of the regulatory
8 agent for Boehringer, and she's the one who would have kind of
9 marshaled the documents and studies and so forth, and had been
10 dealing with the FDA to get FDA approval. She said she was at
11 this advisory committee meeting, which I understand to be
12 about a month before the FDA approval was issued. And that
13 when presented with a transcript of the discussion that ensued
14 at that meeting, she testified about what at least one doctor
15 who was there said. And then I think she testified about
16 other matters related to that advisory committee meeting that
17 aren't objected to that seemed to be outside of quoting
18 anything from what somebody said to me.

19 MR. CHILDERS: That's correct, Your Honor.

20 We objected to her testifying about what another
21 person said, a person who hadn't been deposed in this case.
22 And this was a transcript that was not testimony under oath.
23 This was an advisory committee meeting, which is -- I'm sorry.

24 THE COURT: No. Go ahead.

25 MR. CHILDERS: It's a committee --

1 THE COURT: Well, obviously I interrupted you. I
2 didn't really want to.

3 Is it Dr. Krudys, K-R-U-D-Y-S?

4 MR. CHILDERS: Correct.

5 THE COURT: Is that who she referred to?

6 MR. CHILDERS: Correct.

7 THE COURT: So that's who she purported to quote from?

8 MR. CHILDERS: Correct. And Dr. Krudys gave a
9 presentation here.

10 There were people from various entities, including the
11 government and Boehringer Ingelheim, who came to the advisory
12 committee meeting. And the purpose of the meeting is to have
13 them all talk about what they think about whether or not this
14 drug should be approved. It's not an FDA official
15 proclamation. It is a group of people that the FDA has asked
16 to come and speak to them about this drug, and they can say
17 whatever they want.

18 This happens to be before the drug was approved, as
19 you noted. And everything that was discussed at the advisory
20 committee meeting, even the vote that the advisory committee
21 had, is nonbinding on the FDA.

22 So this is not an FDA official government document.
23 This is an unsworn transcript from which the defendant is
24 trying to put in hearsay as to what another person said.

25 THE COURT: And Dr. Krudys --

1 MR. CHILDERS: Yes, sir.

2 THE COURT: -- was the rep -- he was a pharmacometrics
3 reviewer for the FDA?

4 MR. CHILDERS: That's right.

5 THE COURT: Okay. And he was leading, I guess, the
6 Office of Clinical Pharmacology? That's part of the FDA?

7 MR. CHILDERS: Correct, and they have lots and lots of
8 offices.

9 THE COURT: Sure.

10 MR. CHILDERS: He happened to be one of the people who
11 made a presentation. He didn't put out an official FDA paper
12 or proclamation. He gave a power point and talked about it.
13 That's hearsay. That doesn't fall under the exceptions under
14 803 for a government record, and so our argument is it
15 shouldn't come in.

16 We didn't object to the other stuff that is not
17 hearsay. We just objected to her specifically talking about
18 what another witness made with an out-of-court statement
19 because she's clearly offering it for the truth of the matter,
20 Your Honor.

21 THE COURT: All right. Thank you.

22 MS. JONES: Your Honor, with the Court's permission,
23 our colleague, Mr. Hailey, who has been working on the
24 deposition designation issues, will handle this argument.

25 THE COURT: Just make sure you slide a microphone

1 over.

2 MS. JONES: Thank you, Your Honor.

3 MR. HAILEY: Good morning, Your Honor. Nick Hailey.

4 So I just want to address sort of the nature of the
5 advisory committee. I think what's -- your impression of the
6 nature of this meeting is accurate.

7 This was a meeting that was convened by the FDA for
8 the specific purpose of providing a recommendation in
9 connection with the review and approval of Pradaxa. It was
10 convened by the FDA pursuant to the Federal Advisory Committee
11 Act.

12 (Off the record.)

13 MR. HAILEY: So the people that were part of this
14 advisory committee and that attended the meeting, they were
15 representatives from the FDA. They were independent experts
16 who were special government employees for purposes of the
17 meeting.

18 THE COURT: Is that what Dr. Krudys was?

19 MR. HAILEY: Dr. Krudys was a full-time employee of
20 the FDA. He is a pharmacometrics reviewer. He not only
21 presented at this meeting in advance of approval, he conducted
22 the FDA's exposure response review as part of the approval
23 process. And he actually authored one of their review memos
24 that the FDA itself issued when, a month after this meeting,
25 it approved this medicine.

1 So Dr. Krudys at this meeting is very much presenting
2 on his investigation of the data on this medicine, his
3 conclusions, his factual findings. He's expressing his view
4 on the medicine. He's presenting on behalf of the FDA at this
5 meeting, and later those views were expressed in the FDA
6 review memo that he issued.

7 THE COURT: Well, that's one of my questions.

8 So if you've got the FDA approval, then why do you
9 need a witness to testify what one of the reviewers said at a
10 meeting?

11 MR. HAILEY: Well, we think that this is an
12 important -- there's a question asked at the meeting about
13 whether monitoring should be required, and Dr. Krudys responds
14 directly to that question, and that's the specific portion of
15 the transcript that Ms. Kliever is asked about.

16 And he very clearly provides his view based on the
17 data of whether monitoring should or should not be required,
18 and that is captured in the advisory committee meeting in a
19 clear way that we, ah, think is -- think is relevant and
20 important here, that it's not captured in that same way in the
21 memo that he later issues.

22 THE COURT: Well, that's what I was going to ask
23 about.

24 So he doesn't say this in the context of the FDA's
25 approval. In other words, it's not -- there's no memorandum

1 or similar statement from him as part of the FDA approval,
2 formal approval, whatever that consists of?

3 MR. HAILEY: Again, his -- his memo that he issues at
4 approval is sort of more focused on his exposure response
5 analysis. It's much more sort of in the weeds. It's not this
6 simple expression that he's having in this conversation at the
7 FDA advisory committee meeting.

8 THE COURT: Okay. Anything else?

9 MR. CHILDERS: Your Honor, that's exactly the point,
10 it's not part of what the FDA officially found. It's just him
11 talking at a meeting.

12 If it had been in -- if this was the FDA memo that
13 Ms. Kliever was testifying about, I wouldn't be standing here.
14 This is hearsay, and it shouldn't be approved.

15 THE COURT: I'm afraid I agree with the plaintiffs on
16 this. I really appreciate the supplemental argument you made.
17 It helped me a lot to understand and, to me, did make it a
18 much closer question because I wasn't sure what this advisory
19 council's role was.

20 But it does seem to me that the problem here is that,
21 while the advisory council has a role, this is simply a
22 statement by one of the participants in that council, even if
23 he's got FDA authority in a forum. And I don't think it has
24 the imprimatur of being government action in the sense that
25 it's approved by the FDA or a statement by the FDA, and I

1 think that's what creates the problem under 803.

2 I think it does not become an official act or official
3 record just because it's a statement made by even a government
4 official at some type of a forum. I think that would open
5 this rule far more than it is intended.

6 And because it's government, if the jury hears this
7 and they're told, well, this is the official public record,
8 this is an admissible statement because he speaks for the FDA,
9 I think that that is troublesome. I think that that
10 exaggerates the connection between his statement and his role.

11 So I'm going to sustain the objection. I won't allow
12 that specific part that you've objected to come in because I
13 do think it's hearsay.

14 All right?

15 MR. CHILDERS: Thank you, Your Honor.

16 THE COURT: The next one, this is -- I don't know how
17 you say these names.

18 MR. CHILDERS: Can I stop you for a second?

19 THE COURT: Yes.

20 MR. CHILDERS: You will be happy to hear that's been
21 withdrawn because we have reached an agreement on the
22 testimony from Dr. Klaus Dugi.

23 And I do want to say this, Your Honor, as an aside.
24 Mr. Hailey and I spent four or five days solid on the phone
25 together and worked very cooperatively to limit the objections

1 we had. And I wanted to just tell the Court how much I
2 appreciate how cooperative that was from the defense, and I
3 think it's really helped us to all come here ready to try this
4 case.

5 THE COURT: Maybe I ought to send you two back to see
6 if you can't settle this case. Probably not?

7 Well, so does that resolve all of the objections you
8 raised with Dr. --

9 MR. CHILDERS: Dugi. Yes, sir.

10 THE COURT: Okay. Great. So I deny the objection
11 with regard to Dr. Dugi.

12 MR. CHILDERS: Okay.

13 THE COURT: Then next is --

14 MR. CHILDERS: Dr. Abdelgaber.

15 THE COURT: Abdelgaber.

16 I know what that one is about. I've got a pretty good
17 understanding of it. I'll let you make a brief argument if
18 you like.

19 MR. CHILDERS: Your Honor, the requirement for
20 causation opinion evidence and testimony in the Fourth Circuit
21 is that it must be more probable than not, and that mere
22 possibilities are not relevant. They're not to go to the jury
23 for the jury to consider, and that is why we've made this
24 objection here.

25 He clearly said this was a possibility. The prior

1 question and answer we did not object to where they talked
2 about whether or not these other hospitalizations could have
3 affected her health. But as soon as he said it's a
4 possibility, not a probability, that made it inadmissible in a
5 court of law, and that's why we've objected to that.

6 THE COURT: Well, I'm going to deny that objection. I
7 think the argument kind of confuses the difference between
8 what is admissible evidence and what is required in order to
9 get an issue to the jury. And I think the cases you cited
10 really stand for the proposition that in a causation context,
11 let's say, is this.

12 The proponent has to get evidence sufficient for a
13 jury to find that it's probable, reasonably certain or
14 something like that. I don't think that it's necessarily the
15 test for admissibility of an opinion. I think if this were
16 the only opinion, and they had a burden to prove the
17 probability of a fact, it would be insufficient. But I think
18 they're the opponents here, and I think that they can use
19 possibility evidence as a way of challenging your case.

20 In effect, the doctor says, well, it's possible, but
21 he clearly doesn't think that is what occurred. But in either
22 regard, it doesn't make the evidence inadmissible. It might
23 not be enough on its own to get an issue to the jury, but I
24 don't think that that precludes the admissibility. So I deny
25 the objection.

1 MR. CHILDERS: Thank you, Your Honor.

2 THE COURT: Then the next one is Dr. MacFarland, and
3 I'm going to say I'm confused about what to me is the
4 essential fact that may or may not be at issue here.

5 I understood from my prior readings on all of this
6 back when we were dealing with all these motions, and then
7 from your objection, that Dr. MacFarland does not purport that
8 she ever discussed the Pradaxa prescription with Ms. Knight or
9 her family. And yet now I think in the response that they
10 filed, they said, well, she does say that she may have had
11 that conversation or did.

12 So in --

13 MR. CHILDERS: So she testifies -- the deposition was
14 kind of interesting. We did not have the entire record. She
15 found another record while we were in her deposition that sort
16 of clarified what happened.

17 We all believed that Ms. Knight, her son and daughter
18 made an appointment, went in and sat down with Dr. MacFarland
19 to talk about being switched to Pradaxa.

20 THE COURT: Right.

21 MR. CHILDERS: When she was questioned, she said, I
22 really -- I don't remember that. But if that is -- you know,
23 I know we started her on the drug, I just don't remember that.

24 While we were there, she went and found another record
25 that showed that the family actually met with her nurse, Nurse

1 Clagg, when they came in to get the prescription. So any risk
2 benefit information they got would have been from the nurse.
3 After that, Dr. MacFarland continued to fill the prescription,
4 but she didn't have the initial risk benefit discussion with
5 them.

6 And so our objection is very limited. There's a lot
7 of testimony in here that we did not object to about what she
8 knows about Pradaxa, what she thinks about Pradaxa. The only
9 things we objected to were hypothetical questions that were
10 asked of her as if they were having that meeting, that initial
11 meeting, and she was asked what would you have told Ms. Knight
12 at that meeting?

13 That didn't happen, and so that's why we've objected
14 to that very limited testimony.

15 THE COURT: Okay.

16 MR. LEWIS: Yes, Your Honor. Thank you.

17 Both of the plaintiffs in this case testified that
18 they actually did meet with Dr. MacFarland, so there is a real
19 issue of fact here, what exactly took place at the time the
20 decision was made to switch from warfarin to Pradaxa.

21 I think the jury has got to make this determination
22 and hear all of the evidence about that. But with respect to
23 Dr. MacFarland's policies and practices, that's relevant to
24 the issue of whether it's more likely than not that the risks
25 and benefits were disclosed at the time of the switch.

1 But more importantly, the time of the switch is not
2 the only relevant time period here. If Dr. MacFarland
3 otherwise communicated with the plaintiffs at any time about
4 the risks and benefits of Pradaxa, then that would be relevant
5 evidence as well.

6 THE COURT: Well, let's take these things one at a
7 time.

8 MR. LEWIS: Sure.

9 THE COURT: With regard to that latter point, did Dr.
10 MacFarland testify that she had reason to believe that, at a
11 subsequent meeting with Ms. Knight or her family, perhaps to
12 renew a prescription or whatever, that she may have had those
13 conversations?

14 MR. LEWIS: It's not clear from Dr. MacFarland's
15 testimony that she did.

16 THE COURT: Okay.

17 MR. LEWIS: It's somewhat equivocal based on the
18 plaintiffs' testimony as to when they, if ever, talked to Dr.
19 MacFarland.

20 THE COURT: All right. So it's really kind of the
21 same answer to both.

22 MR. LEWIS: Correct.

23 THE COURT: So whether it was the first meeting or
24 subsequent meetings, the kids testified that they were present
25 when Dr. MacFarland discussed Pradaxa?

1 MR. LEWIS: Mr. Knight's testimony, and we cited this
2 in our opposition paper, says there was an office visit with
3 Dr. MacFarland where you talked about Pradaxa around this
4 time.

5 And then Ms. Stevens, who is the daughter of Betty
6 Knight, testified about an October 2011 meeting between Dr.
7 MacFarland, Mrs. I think Stevens -- or, no, Mrs. Knight and
8 the plaintiffs to discuss the prescription for Pradaxa.

9 So it's hazy about whether Dr. MacFarland was involved
10 in this or not, but I think that's a jury question. I think
11 the jury has got to sort out who was really talking to whom
12 and what was disclosed, and they ought to hear all of the
13 evidence about that.

14 Otherwise, if we start taking away evidence, well,
15 then Dr. MacFarland's entire testimony is irrelevant. I mean,
16 if she's out, then she's got to be out entirely, including
17 about any decisions about whether to monitor, about whether to
18 change -- I mean, we've got to either go one way or the other.

19 I --

20 THE COURT: I don't know that that follows to me, but
21 let me interrupt you because I think this is critical.

22 MR. LEWIS: Sure.

23 MR. CHILDERS: May I --

24 THE COURT: Is that what the Knights said?

25 MR. CHILDERS: So what both the children said was we

1 went to Dr. MacFarland and got the prescription. When they
2 were pressed further on page 54, for instance, on Rick
3 Knight's deposition, he was asked:

4 Do you have any independent recollection about this
5 office visit when this office visit took place with Dr.
6 MacFarland?

7 He said, No, I don't. And he also said, I don't
8 remember her telling me about any risks and benefits. So did
9 Claudia. They both said that.

10 It all fits together with the fact that they knew they
11 went to her office and had it prescribed. None -- they don't
12 remember any conversation --

13 THE COURT: Are they going to testify?

14 MR. CHILDERS: Yes, sir.

15 THE COURT: Okay.

16 MR. CHILDERS: But they don't remember any
17 conversation actually occurring. They don't have any
18 recollection of that, and it's because it didn't happen.

19 THE COURT: Have you all talked to the nurse? Has the
20 nurse been --

21 MR. CHILDERS: We tried. She is out of state. Dr.
22 MacFarland said she didn't even know how we could get in touch
23 with her.

24 THE COURT: All right.

25 MR. LEWIS: But again, from our perspective, this is

1 just a factual issue that the jury has got to figure out. And
2 the policy and practices of Dr. MacFarland and her office are
3 still relevant for the jury to consider, who is talking to
4 whom and what was communicated and what's more likely than not
5 to have been communicated when memories are hazy and
6 recollections are fuzzy.

7 THE COURT: Well, you know, honestly it seems to me
8 that I probably can't resolve this. If the predicate for the
9 testimony from Dr. MacFarland that you want in is that the
10 children said we had a conversation with Dr. MacFarland when
11 she prescribed, then I'm going to let you use it. But if they
12 testify that, no, it wasn't, then I don't think that you've
13 got an independent basis for using this part of Dr.
14 MacFarland's testimony.

15 If --

16 MR. LEWIS: Well, we would probably have to impeach
17 them with their deposition testimony.

18 THE COURT: Impeach them?

19 MR. LEWIS: Probably.

20 THE COURT: Oh, sure. I think you can.

21 MR. LEWIS: Okay.

22 THE COURT: Yeah, I'm not --

23 MR. LEWIS: Okay.

24 THE COURT: I think that is fair game.

25 MR. LEWIS: Okay.

1 THE COURT: But --

2 MR. LEWIS: I'm just concerned that Dr. MacFarland is
3 going to be played before the plaintiffs.

4 MR. CHILDERS: I was going to say that, Your Honor.
5 That is going to happen. And so to the extent there is some
6 way for us to resolve it -- I don't want to surprise anybody.
7 We're going to play her testimony before the children testify.

8 MR. LEWIS: But we could play the depo -- we could
9 independently play the deposition testimony of the plaintiffs.
10 Those are party admissions. I mean, we have the predicate
11 already. So they can't -- they may be able to embellish upon
12 the facts, but the admissions are the admissions, which we
13 cited in our paper. So that's enough of a predicate to allow
14 the MacFarland testimony to be played no matter what they say
15 on the stand.

16 I could play that -- I could play those admissions in
17 my case in chief, and that's a sufficient predicate for the
18 evidence of Dr. MacFarland's testimony even if the plaintiffs
19 get on the stand.

20 I guess what I'm suggesting is, it's not about waiting
21 to see what the plaintiffs are going to testify --

22 THE COURT: I think you may be right. So they're the
23 plaintiffs.

24 MR. CHILDERS: Yes, sir.

25 THE COURT: They are statements by a party. If they

1 made statements in a deposition that we met with Dr.
2 MacFarland about this prescription, then I think that that is
3 a sufficient basis for them to use this part of Dr.
4 MacFarland's testimony.

5 MR. CHILDERS: Understood.

6 THE COURT: So I am going to deny the objection based
7 upon the representations, as you've agreed upon really, that
8 the plaintiffs themselves, the Knight children, made these
9 statements to the effect that they met with Dr. MacFarland
10 about the prescription.

11 MR. CHILDERS: Understood, Your Honor.

12 THE COURT: Okay?

13 MR. CHILDERS: This is a great segue.

14 The last one --

15 THE COURT: Yes.

16 MR. CHILDERS: -- Dr. Gunnalaugsson, there is no
17 question, he never prescribed either coumadin or Pradaxa to
18 Ms. Knight. And defendants are trying to elicit the same kind
19 of testimony from him. What would you tell patients? What do
20 you warn patients about when you meet? That's not relevant to
21 this case because he unequivocally stated I didn't have any
22 decision-making at all with regard to prescribing Pradaxa or
23 warfarin to this particular patient.

24 And so for the same reasons you just denied it, I
25 think you have to grant this objection.

1 THE COURT: All right.

2 MR. LEWIS: The testimony that -- if I recall
3 correctly, is about specifically communications with the
4 plaintiffs and Mrs. Knight, not policies and practices. I
5 think Dr. Gunnalaugsson's testimony is specific about
6 communications with the plaintiffs themselves and Mrs. Knight.

7 THE COURT: Well, I read through this, the excerpts,
8 you know, the part you all identified, and I don't recall
9 seeing that.

10 I thought -- I think there were three matters --

11 MR. CHILDERS: Right.

12 THE COURT: -- to which there were objections.

13 And the first was about his testimony about the risks
14 of Pradaxa if he's prescribing it. I thought there wasn't any
15 indication there that he would have -- he didn't prescribe
16 Pradaxa. I didn't think there was any indication that he
17 would have had any reason to have that discussion with the
18 Knights.

19 So, as to that, I didn't see how -- am I missing
20 something?

21 MR. LEWIS: And my -- I think there is two issues
22 about -- there's no question that there was not an actual
23 prescription by this physician.

24 THE COURT: Okay.

25 MR. LEWIS: But that doesn't end the inquiry as to

1 whether there was a communication --

2 THE COURT: Right.

3 MR. LEWIS: -- between anyone and the plaintiffs.

4 If the plaintiffs were warned by anyone, a home health
5 care provider or a doctor that didn't prescribe Pradaxa, about
6 the risks of Pradaxa --

7 THE COURT: Sure.

8 MR. LEWIS: -- that is still relevant to causation.

9 THE COURT: I agree.

10 But now we're talking about Dr. --

11 MR. CHILDERS: Gunnalaugsson.

12 THE COURT: -- Gunnalaugsson, and he was an
13 interventional cardiologist.

14 And where I understood the first of the plaintiffs'
15 objections, I made notes kind of in quotes that he testified
16 about what he perceived the risks of Pradaxa to be when he's
17 prescribing it. But that he did not purport that he had such
18 conversation with any of the plaintiffs.

19 MR. LEWIS: Well, the specific testimony is on page
20 111, 1 through 18.

21 THE COURT: All right. Let me get up with you here.

22 111 -- oh, okay. Wait a minute.

23 MR. LEWIS: So that is at least what I was referring
24 to. Because what Dr. Gunnalaugsson is saying is that, because
25 Mrs. Knight was having some trouble understanding based on

1 perceived dementia or whatnot, he was having communications
2 with the son and has a recollection of the son having an
3 understanding about the risks of Pradaxa.

4 MR. CHILDERS: Your Honor, I was kind of going in
5 reverse order. I think that's why we are a little confused
6 here --

7 THE COURT: Okay. All right.

8 MR. CHILDERS: -- because it segued I thought from the
9 last argument.

10 THE COURT: All right. So --

11 MR. CHILDERS: We had three different objections.

12 THE COURT: Yes. Okay. I am glad you clarified that.

13 MR. CHILDERS: I apologize.

14 THE WITNESS: Well, let's take the one that we've
15 addressed first. So it does seem to me that his discussion on
16 this page, to which you objected, he does purport that he had
17 discussion with the son and her or her.

18 MR. CHILDERS: He doesn't actually say that, Your
19 Honor. And this is -- and just so you understand, Dr.
20 Gunnalaugsson answered lots and lots of questions that were
21 never asked of him. This happened to be one of them.

22 And he says son was aware of it, and he says why -- he
23 was asked why do you say that? And he says because we talked
24 about it. But then he changes and says he was aware of it,
25 and she seemed to understand, too. I don't know how to grade

1 her dementia basically.

2 And then he says they were fully aware that she had
3 chronic GI bleed, and that this would increase her risk, but
4 he doesn't say he actually discussed that with them.

5 THE COURT: Well, you know, if you're going to use the
6 deposition, I'm going to deny the objection as to this point.

7 I think --

8 MR. CHILDERS: Okay.

9 THE COURT: -- it's close enough that the jury should
10 hear and decide for itself what they think about that.

11 MR. CHILDERS: Understood.

12 THE COURT: So that part I'll deny.

13 MR. CHILDERS: The next part, Your Honor, he's asked
14 if he would utilize a particular coagulation test for a
15 bleeding patient.

16 THE COURT: Right.

17 MR. CHILDERS: He didn't treat her for her bleed --

18 THE COURT: Right.

19 MR. CHILDERS: -- and so we don't believe that is
20 relevant.

21 THE COURT: So how does the defense believe this is
22 relevant?

23 MR. LEWIS: It's really more, Your Honor, beyond
24 whether this physician treated for the bleed. It's whether
25 monitoring is necessary or not even absent a bleed --

1 THE COURT: Well, but now aren't you spilling over
2 into asking him what should be an expert opinion? I mean, he
3 is an expert, he's got opinions, but that doesn't make him an
4 expert for the defense to introduce his opinion evidence about
5 matters outside of his treatment.

6 MR. LEWIS: It's actually more about causation.

7 THE COURT: Okay.

8 MR. LEWIS: So this physician was her treater during
9 this time frame. He was her cardiologist. And if that
10 physician is saying, hey, this isn't going to be helpful to
11 me, this aPTT test, then that's relevant to causation.

12 Because what the plaintiffs are arguing is, hey, you
13 should have been doing aPTT testing all long, and that would
14 have guided treatment of this particular plaintiff and avoided
15 a bleed event. And this doctor is saying this isn't -- I
16 wouldn't even do this.

17 THE COURT: I'm going to grant this objection. I
18 think this is one of those times where the use of his
19 testimony spills outside of the scope of his treatment in that
20 this was not -- he was not testifying about a decision he made
21 in the course of her treatment. He's offering opinions about
22 how would he would address certain matters, but I think it's
23 outside of the treatment. And since it's outside of the
24 treatment, I don't think you get to convert him to an expert
25 on causation or anything else. It goes beyond his treatment.

1 So I'm going to grant that part.

2 And then the last, which I guess is where you were to
3 begin with, where --

4 MR. CHILDERS: Yes.

5 THE COURT: -- he testified about the fact that he
6 hadn't prescribed warfarin for two or three years.

7 MR. CHILDERS: Right. He never prescribed warfarin to
8 this patient at all. He didn't prescribe any anticoagulation
9 to Ms. Knight. So whatever his personal practice was is
10 irrelevant for one, for that purpose.

11 And also he's talking about the last two or three
12 years, which is after Ms. Knight has already died. That can't
13 possibly be relevant to what happened during her lifetime.

14 THE COURT: Okay.

15 MR. LEWIS: Well, again, Your Honor, it's very similar
16 to when the Court was ruling on our summary judgment motion.
17 The Court found that, for instance, Dr. MacFarland's testimony
18 that she would have made some different treatment decisions --
19 again, all speculative because we're talking about alternative
20 scenarios here that didn't actually occur -- Dr. MacFarland
21 would have treated the patient differently with certain
22 information, this is the same principle.

23 What the plaintiffs are arguing here is that Mrs.
24 Knight should have been on warfarin instead of Pradaxa. And
25 if -- and this is her cardiologist. This is the guy making

1 that call for her, and this guy making the call says, I
2 would't have made that call. And that's very, very critical
3 to the specific warning cause. It's not an opinion, it's
4 specific warning causation just similarly to what the Court
5 ruled -- or relied on in the summary judgment motion.

6 THE COURT: Well, I disagree.

7 You know, I guess this gets to be a close question if
8 you have a doctor who testifies that I considered different
9 things, and here's what I decided. I think when he testifies
10 that he considered things at the time of the treatment -- for
11 instance, if he had testified, you know, when she was my
12 patient, I knew she was on Pradaxa. I thought about warfarin,
13 but I wouldn't prescribe -- decided not to prescribe it. I
14 think that is admissible, I think that is part of his
15 treatment.

16 But I think this goes outside of that because this is
17 just asking him to express an opinion that was not formed at
18 the time of and as part of the treatment. And I guess maybe
19 that is for better or for worse, maybe hopefully a little
20 clearer articulation by me of where I think we draw the line
21 on what a treating doctor can testify about who is not being
22 converted into a party expert beyond the treatment.

23 MR. LEWIS: And not to ask the Court for -- my
24 understanding, then, from Your Honor is that it's really
25 because of the time frame that he is talking about, which is

1 two to three years, and not back when he was making real-time
2 decisions?

3 THE COURT: Yes.

4 MR. LEWIS: Okay.

5 THE COURT: Yes, that's part of it.

6 MR. LEWIS: Understood.

7 THE COURT: I think what he raised about whether this
8 opinion is even an opinion he held during the time of
9 treatment, I think that's a fair issue. But, yeah, I think
10 this is not a judgment that he made during the course of and
11 part of the treatment, so I'm going to grant that objection.

12 MR. CHILDERS: That was our final objection.

13 THE COURT: So here's what I'd like for you to do,
14 then, after we conclude.

15 I want the parties to get together and go back through
16 these depositions and, based upon my rulings, make sure that
17 you know and agree what's in and what's out so that we don't
18 have a problem later on.

19 And how are you going to -- are these video
20 depositions?

21 MR. CHILDERS: Yes, sir.

22 THE COURT: So I assume --

23 MR. CHILDERS: Gina Veldman back here will be taking
24 care of all that for us.

25 THE COURT: All right. And then so how do you

1 intend -- do you intend to excerpt those portions that I've
2 sustained and just delete them?

3 MR. CHILDERS: You would be amazed at what she can do
4 with these video transcripts.

5 THE COURT: Probably make a witness say anything she
6 wanted them to.

7 MR. CHILDERS: Unfortunately she can't do that, and we
8 wouldn't ask her to do that.

9 But she is very good at what she does, and we are
10 working with them -- I'm sorry.

11 Well, we don't really need to get into the
12 technicalities of it.

13 THE COURT: I'll trust --

14 MR. CHILDERS: We've done this a few times now, and
15 we're all pretty comfortable with how it goes.

16 THE COURT: Okay. Very good.

17 All right. Let's go to the defendant's objections to
18 the plaintiffs'.

19 MR. CHILDERS: Is it okay if I stay here?

20 THE COURT: Yes, you may.

21 MR. CHILDERS: Okay.

22 THE COURT: I'm going to start by turning to your
23 opponent. Tell me what you think is relevant and admissible
24 out of this launch video.

25 MR. CHILDERS: Your Honor, the launch video is

1 basically the company getting together all of their sales reps
2 to encourage them to push this drug on doctors and patients
3 around the country. And the launch video shows that the
4 entire drive that they at least edited -- this is not edited
5 by me or anybody on my team, this is how we got it from BI --
6 is money.

7 They talk about how much money this is going to make
8 for the company, what a blockbuster drug it's going to be.
9 They asked sales reps, who are agents of the company, what
10 they think. Everybody who speaks on the video is an agent of
11 the company. They work for the company. There's only one
12 person in the entire video who says we're going to help
13 patients.

14 I think that's relevant, Your Honor, because we have
15 to prove by clear and convincing evidence that, in this case,
16 we believe Boehringer put profits over patient safety. This
17 is clearly evidence of that from the beginning. This is
18 before the drug was even on the market.

19 They gathered all of their folks together. They had
20 this big, huge, celebratory meeting. And when they cut the
21 video to send to us, for whatever reason, these were the most
22 important parts that they left in the video.

23 THE COURT: Well, since I've bifurcated the punitive
24 claim, why should this be allowed during your liability phase
25 and not --

1 MR. CHILDERS: Well --

2 THE COURT: -- pushed to the punitive phase if we get
3 to that?

4 MR. CHILDERS: We have to get there first, and this is
5 evidence of the company putting profits over patient safety.
6 The jury has to check the box first before we get to damages,
7 punitive damages. This is clear evidence of the company
8 putting profits before patient safety and we believe will
9 allow the jury to see that that box should be checked.

10 When we move on to punitive damages evidence, my
11 understanding, Your Honor, is we're talking about money, just
12 money. We're not talking about the actual acts. We have to
13 show the acts to get us there in the first phase of the trial.
14 Otherwise we don't get to phase 2 of the trial, at least that
15 is my understanding of how I've done it in the past.

16 And so this is an admission of the company. It's
17 their document. They produced it. It's all of their people
18 in the video. And it's made by them. We believe it's
19 relevant specifically for the issue of whether or not punitive
20 damages should be awarded, and that's why we think it should
21 be admitted.

22 THE COURT: All right.

23 MR. HAILEY: So we obviously disagree on the
24 relevance. We don't believe that this video is remotely
25 relevant to plaintiffs' claims.

1 This same video plaintiffs have sought to introduce
2 into evidence in the first two Connecticut Pradaxa trials that
3 have been held to date. In both of those cases, this video
4 was precluded on a number of grounds, including that it is not
5 relevant.

6 THE COURT: Is that other trial still going on?

7 MR. CHILDERS: Yes, sir.

8 THE COURT: Was it used there?

9 MR. CHILDERS: No, sir.

10 MR. HAILEY: And, Your Honor, we've submitted as
11 Exhibit 1 and 2 to our objection brief the Connecticut
12 rulings, but I just want to highlight the language from the
13 first Connecticut court's ruling because I think it really
14 encapsulates our view. And this is reading from the order.

15 There are no statements made in the video to suggest
16 that any particular act or omission by the defendant that is
17 relevant to this case was driven for financial reasons. The
18 court finds that the vast majority of the video is irrelevant
19 under Code Section 42, which is the Connecticut equivalent to
20 Federal Rule of Evidence 402.

21 THE COURT: Well, I've read those decisions. I'm
22 going to grant the objection. I don't believe you can use
23 this launch video in your case in chief. If we get to a
24 punitive stage, I think I would let you use it then.

25 MR. CHILDERS: Okay.

1 THE COURT: But I think it is largely irrelevant. And
2 to the extent it has any probative value, it is greatly
3 outweighed by the prejudice.

4 Companies are expected to motivate a sales force to
5 sell their product, and I don't think that the fact that this
6 is -- the focus of this launch video is on the salespeople, I
7 think the jury shouldn't misconstrue, and I think that it is a
8 risk that they might. So I grant the objection with respect
9 to the launch video.

10 MR. CHILDERS: Understood, Your Honor.

11 MR. HAILEY: And, Your Honor, if you wouldn't mind.

12 In terms of punitives, I think BI would maintain its
13 objection that this launch video is not relevant to punitive
14 damages.

15 THE COURT: If we get to that point, we'll have a
16 chance to take that up again.

17 MR. HAILEY: Okay. Thank you.

18 THE COURT: All right. Next was Kliever's testimony
19 about the fact that at the time of her deposition, the company
20 had not submitted any of this putative therapeutic range data,
21 but did so later.

22 Apparently you all worked out some type of a
23 stipulation on this in other cases, is that --

24 MR. CHILDERS: I did not, Your Honor. Separate
25 counsel did that.

1 THE COURT: All right.

2 MR. CHILDERS: Mr. Moskow was involved in that trial,
3 but he's not the lead counsel either.

4 THE COURT: Okay.

5 MR. CHILDERS: That case is still ongoing now. So --
6 I wasn't involved in that.

7 THE COURT: Okay.

8 MS. JONES: And just to confirm that --

9 THE COURT: Make sure that microphone is on.

10 MS. JONES: Thank you so much. And good morning.
11 Phyllis Jones for BI.

12 The history on this, and really the history is part of
13 what motivates our motion on this testimony, is in the first
14 two trials, Ms. Kliever's testimony was played for the jury,
15 both her testimony from 2014 and then portions of her
16 testimony from 2017. And what happened in both of those
17 trials in Connecticut is that counsel for plaintiffs then got
18 in front of the jury during closing argument and said BI did
19 not submit this information to the FDA. Which we know to be
20 incorrect based on, for example, Appendix B to the brief that
21 we submitted to Your Honor.

22 And so we have become concerned not so much about the
23 testimony, but the way that the testimony has been used in the
24 course of the trials to date, to make what is we think
25 admittedly a provocative claim to the jury that the company

1 somehow failed to provide important information to the
2 company -- to the FDA regarding the safety of the medicine
3 when we know that not to be supported by the evidence.

4 THE COURT: Well, can't you remedy this by putting
5 that into evidence in your case?

6 MS. JONES: Well, certainly we can do that, Your
7 Honor, but we're concerned about arguments like the ones that
8 we've heard in some of the earlier cases that really do not
9 acknowledge that actual fact of the evidence, that the company
10 did in fact submit this information to the FDA.

11 Now, in the third trial in Connecticut, you've rightly
12 picked up on from the briefing that what they did was, right
13 after Ms. Kliever's testimony was played, the parties had
14 reached a stipulation that was relatively short that
15 essentially laid out the history there. We think at a
16 minimum, if plaintiffs are permitted to play this testimony,
17 that there needs to be some kind of instruction from the Court
18 consistent with what we submitted as part of our proposed
19 instructions, that makes clear to the jury what the actual
20 history was here.

21 THE COURT: Well, why don't you submit evidence to the
22 jury in your case about the post-2014 submissions? And then
23 if they try to make the argument -- I can't stop them from
24 making an argument if it's belied by the evidence. You can
25 point that out to the jury, and it seems to me that is your

1 remedy here.

2 Your remedy is to submit evidence that shows that
3 while Mrs. Kliever might have been correct at the time, we did
4 later submit all of these things.

5 MS. JONES: Well, I guess a couple of responses to
6 that, Your Honor.

7 The first response is that the evidence that would be
8 necessary to address the type of representation that we've
9 heard made in the first two of the Connecticut trials would
10 actually compound the prejudice to the company. Because the
11 evidence related to the submission of the information brings
12 in a whole set of articles that were published about, again,
13 what we believe was an incorrect claim about the company
14 withholding evidence from the FDA.

15 And so our only remedy to addressing that type of
16 representation is having to bring in evidence that further
17 complicates the prejudice to the company.

18 We certainly think it's within the power of the Court
19 to preclude counsel from making a representation to the jury
20 that we know to be false based on the actual documentary
21 evidence in the case, and that's all we're asking for.

22 MR. CHILDERS: Your Honor, I disagree.

23 The reason that they're making this motion is because
24 the evidence that they would have to put on shows that they
25 sent the FDA three articles that were published in the British

1 Medical Journal that are scathing about Boehringer Ingelheim.
2 And when they submitted those to the FDA, they submitted them
3 with a press release that says, this is all not true.

4 That is not the same as giving the FDA the information
5 that Ms. Kliever in 2014, a year after Betty died, said we
6 haven't given that to the FDA.

7 I agree with you. If they have evidence to show they
8 specifically gave it to the FDA, they should put it on. We
9 have sworn testimony from their own witness who said I didn't
10 give it to the FDA.

11 THE COURT: So counsel can argue the evidence. And if
12 at the end of the day the only evidence by either side about
13 what was submitted is the evidence that they've cited in her
14 2014 deposition, they're entitled to make that argument
15 because that's what the evidence says.

16 If they submit her deposition, which I take it you're
17 going to offer --

18 MR. CHILDERS: Yes, sir.

19 THE COURT: -- you've got to respond with evidence.
20 And if that opens other doors that are troublesome or a
21 problem for you, that is the way evidence works out.

22 I don't think I can require them to enter into a
23 stipulation, and I can't preclude them from making arguments
24 based upon the evidence. If at trial there is evidence from
25 your side of what you submitted, then if he makes the argument

1 on behalf of the plaintiffs that there was no submission,
2 you've got evidence, and you can tell the jury he's obviously
3 wrong. If instead what it sounds like there's a dispute in
4 the evidence and between the parties as to the facts as to the
5 nature of the subsequent disclosure to the FDA, that is for
6 the jury to decide.

7 So I'm going to deny the objection.

8 Next, I guess, are the references to the e-mail that
9 Dr. Connolly sent. I guess this is the e-mail where he talks
10 about there being perhaps a therapeutic range, 40 to 200 or
11 whatever. And I take it that there were at least three
12 different witnesses in whose depositions or trial or use at
13 trial that this was discussed.

14 So --

15 MS. JONES: And, Your Honor, again with the Court's
16 permission, our colleague, Ms. Perez, will argue those issues.

17 THE COURT: Absolutely.

18 MS. PEREZ: Good morning, Your Honor. Jessica Perez
19 for BI.

20 Yes, so this e-mail was written by Dr. Connolly in the
21 context of having received an early draft of the Reilly
22 exposure paper. And Dr. Connolly responds and appears to at
23 least in this e-mail support the idea that there should be a
24 therapeutic range for Pradaxa.

25 THE COURT: Now, as I understand it, Connolly was one

1 of the people involved in the RE-LY study, but he's not a BI
2 employee or agent at the time that he makes -- sends this
3 e-mail?

4 MS. PEREZ: That's correct. He is a professor at
5 McMaster University in Ontario and a practicing cardiologist
6 who was involved in the RE-LY study.

7 And we're objecting to this e-mail and related
8 testimony based on hearsay. I mean, this e-mail is being
9 presented for the truth of his statement, that there is a
10 therapeutic range for Pradaxa, and that patients should be
11 maintained within that range. And it should be excluded on
12 that basis.

13 THE COURT: Okay.

14 MR. CHILDERS: Your Honor, Dr. Connolly was the
15 principal investigator for the RE-LY trial. He also is a
16 co-author of the article that this e-mail is talking about.
17 He co-authored it with Dr. Reilly and several other people who
18 work at Boehringer. His opinion is clearly relevant to the
19 case as to whether or not this should be included in the
20 e-mail.

21 I do believe for purposes of what was happening there,
22 he's an agent of the company. He is working with them, and he
23 is drafting a paper with the -- with the entire RE-LY group,
24 including the BI employees. And so I think it's an exception
25 to the -- to hearsay.

1 THE COURT: From the way you're describing it, I don't
2 think that you have enough for the foundation to attribute
3 this statement by Connolly to be a statement of the party. So
4 unless you've got something more -- the fact that he was
5 involved in the RE-LY study and that it was in some sense
6 continuing I don't think is enough by itself to make him an
7 agent for BI such that his out-of-court statement would be
8 attributable to them.

9 MR. CHILDERS: Well, they pay him, Your Honor. That
10 makes him their agent. They paid him to do the study and to
11 help write the paper. That's no different from an employee
12 for this purpose.

13 THE COURT: Okay. What about that?

14 MS. PEREZ: Many, many practicing doctors are involved
15 in clinical trials, some in a major way, and collaborate with
16 employees of pharmaceutical companies on published articles.

17 And so that mere involvement in research activities
18 doesn't make a doctor an agent --

19 THE COURT: Well, he's going beyond your involvement.
20 He's saying he was paid by BI for the work that included what
21 he discussed in this e-mail.

22 I mean, if that's the case, it seems to me that is --

23 MS. PEREZ: I don't think that that is in the record,
24 that Dr. Connolly was paid to author the article.

25 THE COURT: Well, here's what I'll do. For now, I'll

1 hold this in abeyance. Find where you have in the record,
2 that is admissible evidence, evidence that converts him from
3 just being a collaborator to being effectively an employed
4 agent for these purposes on behalf of BI.

5 I think the fact that he's in the RE-LY study and all
6 that, that makes him a great expert. It doesn't convert him
7 to their spokesperson, so to speak.

8 MR. CHILDERS: Understood, and I will get that for
9 Your Honor.

10 THE COURT: Okay. So I'll hold off on that until you
11 can -- obviously whatever you can get to me, show to the
12 defense, and we'll see if we need to have further discussion
13 or not.

14 MR. CHILDERS: Yes, sir.

15 THE COURT: Okay?

16 Next, Dr. Eberle.

17 MS. PEREZ: Yes.

18 The testimony that we're objecting to of Dr. Eberle
19 relates to a 2017 European regulatory document that describes
20 a study that was performed in the European Union to assess the
21 effectiveness of patient and doctor education materials that
22 were distributed in the European Union.

23 THE COURT: So this study led to some type of alert;
24 is that correct?

25 MS. PEREZ: The materials were created, and then the

1 study was more of a post-hoc study to determine whether or not
2 those materials helped doctors.

3 THE COURT: Okay

4 MS. PEREZ: And we're objecting to this just based on
5 relevance. This is a European regulatory document. It
6 studies materials that were only distributed in Europe, which
7 dealt only with the 110- and 150-milligram doses.

8 And perhaps more importantly, these materials weren't
9 even created or studied until after the death of Ms. Knight.

10 MR. CHILDERS: Your Honor, Mr. Moskow is going to
11 handle this one.

12 THE COURT: All right.

13 MR. MOSKOW: Good morning, Your Honor. Good to see
14 you again. Neal Moskow for the plaintiffs.

15 Your Honor, let me start by saying that the
16 information in question looks at whether providing specific
17 risk information to both physicians and directly to patients
18 increases the safety of the drug. And they not only concluded
19 that it did, but before the results were finalized, there was
20 a plan to roll this out in the rest of Europe.

21 The planning for this, as Dr. Eberle testified to in
22 his deposition, started more than five years before his
23 deposition. So his deposition was taken in 2017. That puts
24 us at 2012. So the ideas behind this study predate the bleed.

25 And that's particularly relevant here because in West

1 Virginia, the law at the time of this bleed, BI had the duty
2 to warn Ms. Knight directly.

3 THE COURT: So remind me who Dr. Eberle was.

4 MR. CHILDERS: Dr. Eberle is a pharmacovigilance
5 safety officer. In the vernacular of the pharmaceutical
6 industry, it's his responsibility to ensure that the product
7 is safe once it is out in the marketplace. So he headed up a
8 team of scientists, including physicians, that would survey
9 the literature, review adverse event reports and determine
10 whether or not there were safety issues with the drug that
11 needed further evaluation.

12 THE COURT: On behalf of BI.

13 MR. CHILDERS: On behalf of BI.

14 So based on his deposition testimony -- I can provide
15 it to the Court at page 99 -- he indicates that, you know,
16 five years before his deposition, that they had identified
17 these issues, and they were planning the study.

18 And, again, because of the peculiarities of West
19 Virginia law at the time of this bleed, BI had the duty to
20 warn Mrs. Knight directly. And the issue that this paper or
21 this study demonstrates is, first of all, knowledge of the
22 company that this was an issue; second, feasibility, that they
23 had a way to communicate directly with patients that would
24 improve safety; and, third, that once they got around to doing
25 the work, it proved up that that was a fact.

1 So it goes to the failure to do this, you know, basic
2 investigation in time to save Mrs. Knight.

3 THE COURT: Okay.

4 MS. PEREZ: It's just -- it appears that plaintiffs'
5 argument, I guess, boils down to the fact that because the
6 practices in Europe were different from the practices in the
7 U.S., that that somehow makes BI's label inadequate.

8 I mean, the central question in this case is whether
9 the information provided to Ms. Knight provided an adequate
10 warning of the bleed risk.

11 THE COURT: And to me, I think I agree with plaintiff.
12 This is evidence as to the state of their knowledge at and
13 prior to the time of her event. So if BI had knowledge,
14 because Dr. Eberle was involved in this process, then it seems
15 to me that is relevant.

16 MS. PEREZ: The study -- Attorney Moskow described the
17 planning for the study began before her death, but the
18 materials that were developed and tested in Europe were not
19 distributed or studied until after her death.

20 THE COURT: Well --

21 MS. PEREZ: And so the knowledge -- it does not seem
22 to prove that BI knew anything at the time that is relevant
23 for this lawsuit.

24 MR. MOSKOW: I think that the basic statement there,
25 Judge, is that they understood that if they gave more

1 knowledge to patients, it would improve the safety of the
2 drug. And they knew that, that's why they designed the study,
3 and it was so successful that they have rolled it out in the
4 rest of Europe.

5 THE COURT: Well, if it's relevant to BI's knowledge
6 and feasibility of further warnings at or prior to her death,
7 why not stop there with the evidence and not have further
8 testimony about the ultimate results of a study that didn't
9 take place or at least didn't get completed until well after
10 her death?

11 MR. MOSKOW: Because, Your Honor, the data showing
12 that warnings matter is part of the plaintiffs' burden here.
13 We have to -- as the Court has identified in the pre-charge or
14 the preliminary charge, that plaintiffs' burden is to show
15 that a better warning would have made a difference. And so
16 the jury is entitled to hear that when Boehringer gives a
17 better warning, it does make a difference.

18 MS. PEREZ: This, again, seems to boil down to an
19 argument that because information was provided in the European
20 label that was not provided in the U.S. label, that that
21 somehow makes BI's label inadequate. And the Court has said,
22 when it denied Boehringer's motion to exclude foreign
23 regulatory evidence, that that was not an appropriate argument
24 for the plaintiffs to make.

25 And in addition, the feasibility of providing warnings

1 is not an issue in this case. BI does in fact provide
2 warnings to patients, both in the form of the prescribing
3 information for the doctor and the Medication Guide that is
4 included, which goes directly to patients. But those warnings
5 abide by the regulations here in the U.S. as opposed to the
6 regulations in Europe.

7 THE COURT: Well, I think what this speaks to in terms
8 of feasibility is the content of the warning, not just
9 whether -- not some warnings would be effective.

10 I'm going to deny the objection. I would certainly
11 entertain a limiting instruction, if you want to offer one at
12 the time. I do think this is evidence which is admissible as
13 going to BI's knowledge at and prior to the time of her death
14 and to feasibility of the content of the warning.

15 I think if you believe that the jury might somehow
16 misconstrue this, I would certainly give a limiting
17 instruction.

18 Since you've mentioned it, I'll reaffirm my ruling
19 that I do not believe that plaintiffs can use the foreign
20 regulatory approval or process as evidence here, and I think
21 this is outside of that. So I deny that objection.

22 Then last is Dr. Corsico. Explain this one to me.

23 MS. PEREZ: Yes.

24 Your Honor, the testimony that plaintiffs have
25 designated from Dr. Corsico is just a few lines that is pulled

1 out of a larger series of questions dealing with a different
2 plaintiff who was the subject of a different lawsuit.

3 THE COURT: And who is Dr. Corsico? Remind me.

4 MR. CHILDERS: He is a BI employee. He was a
5 cardiologist who worked on the drug.

6 THE COURT: Right.

7 MS. PEREZ: The portion of the deposition involved the
8 questioner asking Dr. Corsico to assume facts about a patient
9 whose records he had not previously seen and to answer
10 questions based on those assumed facts.

11 THE COURT: And this was some male patient who had, I
12 guess it was described as a similar cascade of events that --

13 MS. PEREZ: Yes.

14 THE COURT: I don't know who came up with that phrase,
15 but basically testimony from Dr. Corsico that a different
16 patient had sort of a course similar to the course that
17 plaintiff believes occurred with respect to Ms. Knight
18 generally.

19 MS. PEREZ: Generally, but there are some key
20 differences.

21 THE COURT: Okay.

22 MS. PEREZ: So the way this question proceeded, the
23 questioner asked Dr. Corsico if he could agree that this
24 person died from this series of events, and he explained that
25 he could not give a specific medical opinion on the patient

1 not having seen the records.

2 And in that context, the questioner asked whether it
3 was possible for a series of or cascade of events precipitated
4 by a GI bleed to lead to someone's death, and Dr. Corsico
5 agreed to that.

6 But the context in which he answered that question is
7 very different from the context we're dealing with in this
8 case. The facts that were described to Dr. Corsico involved a
9 patient who had undergone major surgery to have part of his
10 colon removed to treat his GI bleed, who was never discharged
11 home, and who died, you know, within a month. That's very
12 different.

13 The meaning of the words cascade or series of events
14 are very different than this case, in which we are dealing
15 with a patient who never underwent major surgery for her GI
16 bleed, was discharged home, and died more than three months
17 after the cessation.

18 THE COURT: Okay.

19 MR. CHILDERS: Your Honor, I would agree with Ms.
20 Perez if the question asked do you believe that the series or
21 cascade of events could have caused Mr. Higgins' death.
22 That's not what he was asked. He was asked a very general
23 question generally, and I'll read the entire question to you.

24 Okay. Well, do you understand that there can be a
25 series or a cascade of events that can ultimately lead to

1 one's demise that may be precipitated by a gastrointestinal
2 bleed, right?

3 And he answers: Yes, sir.

4 THE COURT: All right. I'm going to sustain the
5 objection. I think in this instance, it is much too vague and
6 presents what I think might be a very confusing scenario to
7 the jury.

8 I don't think there is enough in this question to make
9 this sufficiently similar to the pattern that you've claimed
10 with regard to Ms. Knight to make this relevant evidence. And
11 if it's even close, I think it's much more likely to result in
12 confusion. So I'm going to sustain or grant that objection.

13 All right. Does that take care of -- that's all I had
14 on my list for these objections to depositions.

15 MS. JONES: I think that's all we had, Your Honor.

16 THE COURT: Okay. Are there any other contested
17 issues that the parties are aware of before we -- motions or
18 evidence, matters or things like that, exhibits?

19 MS. JONES: I don't think so, Your Honor.

20 THE COURT: Okay. Have you had a chance to look at
21 the proposed voir dire and preliminary instructions?

22 MS. JONES: We have.

23 MR. MOSKOW: Yes.

24 THE COURT: Before we get into it, do you have much to
25 discuss with regard to either of these?

1 MR. MOSKOW: Your Honor, on the plaintiffs' side, we
2 have two issues with the proposed charge and three with voir
3 dire or visa versa.

4 THE COURT: Okay. And what about you folks?

5 MS. JONES: We have some issues, Your Honor.

6 THE COURT: All right. Then we're going to take a
7 brief recess. I've got to get my copies of these documents
8 anyway.

9 MS. JONES: Thank you.

10 THE COURT: We'll take a 10-minute recess.

11 (Recess taken from 11:03 to 11:15 a.m.)

12 THE COURT: All right. Let's start with the voir
13 dire, and I'll listen to the plaintiffs first.

14 MR. MOSKOW: Thank you, Your Honor. Neal Moskow for
15 the plaintiffs.

16 Your Honor, with regard to voir dire -- and I can
17 submit these in writing. I just wasn't sure what Your Honor's
18 preference was.

19 But specifically with regard to the voir dire, Section
20 Bla, which identifies the lawyers --

21 THE COURT: Okay.

22 MR. MOSKOW: -- we would propose, based on the
23 conversation we had off the record, to excise --

24 THE COURT: Yeah, we'll take Harry's name out of it.

25 MR. MOSKOW: Thank you, Your Honor.

1 We would also seek to excise the two attorneys from
2 the Salim Beasley office who are no longer actively involved
3 in the case. So that would be Lisa Causey and Robert Salim.

4 THE COURT: Okay.

5 MR. MOSKOW: Your Honor, the only other issue that
6 we'd like to raise with regard to the voir dire has to do with
7 Section E8. And the question reads: Are you willing to judge
8 witnesses who work for a pharmaceutical company in the same
9 way that you would judge any other witness?

10 Our position is, Your Honor, that singles out a
11 specific witness and should not be asked. If the Court is
12 inclined to ask such a question, we would ask for a mirror
13 image charge or question to the effect of, are you willing to
14 judge the witnesses who have sued a pharmaceutical company in
15 the same way you would judge any other witnesses?

16 THE COURT: Okay. What's the defense say on those two
17 possibilities?

18 MS. JONES: We discussed this over the weekend. I
19 apologize.

20 We've discussed this over the weekend. We have no
21 objection to that addition if the Court is okay with it.

22 THE COURT: All right. So your position would be to
23 give the corresponding question?

24 MS. JONES: Yes, Your Honor.

25 THE COURT: And that satisfies you?

1 MR. MOSKOW: It does, Your Honor.

2 THE COURT: All right. We will add that question,
3 then, as No. 9 and then renumber the remaining --

4 MR. MOSKOW: Those are all the issues the plaintiffs
5 have, Your Honor. Thank you.

6 THE COURT: All right. Let's hear from the defendant.

7 MS. JONES: Your Honor, also fairly limited
8 suggestions on the voir dire.

9 As to the listing of defense counsel in section Bc, we
10 wanted to just cut some of the folks from the list.

11 And, of course, we can submit this --

12 THE COURT: Yeah, why don't you do that.

13 MS. JONES: -- if that would be helpful.

14 THE COURT: Give them to Blake, and he'll take care of
15 it.

16 MS. JONES: Okay. We'll do that. Should I go through
17 the list now?

18 THE COURT: Do you have a corporate representative
19 that you have decided upon?

20 MS. JONES: We don't -- we will not have anyone
21 sitting at counsel table.

22 THE COURT: Okay.

23 MS. JONES: Ms. Danielle *Devine will be in the
24 audience, and I will probably introduce her, but she won't be
25 sitting at counsel table.

1 THE COURT: All right.

2 MS. JONES: So I suspect that could probably come out.

3 THE COURT: We will just take that out, then, if
4 you're not going to have anybody at the table.

5 Okay.

6 MS. JONES: Your Honor, did you want me to read
7 through the lawyers who should come out of the list or just --

8 THE COURT: Just give that to Blake when we are
9 finished.

10 MS. JONES: Okay. The only addition that we would
11 suggest to the substantive questions would be in Section D.
12 We had proposed to plaintiffs adding a question about Plavix:

13 Have you, a family member or a close personal friend
14 ever been treated with the drug Plavix? If so, who? What was
15 the reason for the prescription? Please describe the person's
16 experience with the medication and current health condition.

17 THE COURT: And why do we need to add --

18 MS. JONES: Because Plavix was also a medicine that
19 Mrs. Knight was on at a certain point during her life and is a
20 medicine that carries a risk of bleeding as well.

21 THE COURT: Okay. What's plaintiffs say to that?

22 MR. MOSKOW: We have no objection to adding that, Your
23 Honor.

24 THE COURT: All right. We'll add, then, the
25 corresponding question about Plavix.

1 MS. JONES: Okay. And we can send that as well, Your
2 Honor.

3 THE COURT: All right.

4 MS. JONES: Those were the only issues that we had on
5 the voir dire.

6 THE COURT: Okay. Then we'll make those changes.

7 Let me comment. You've got the questionnaire, the
8 supplemental questionnaire that the Court sent out. What I
9 propose we probably have to do, as I've included those
10 questions on the voir dire, is to ask those questions again
11 orally here in the courtroom.

12 We know a number of people have responses. Hopefully
13 they'll indicate that, you know, if somebody has -- I don't
14 have the list of all of these jurors, and I haven't gone
15 through them like I suppose you have, so I suspect I'll ask
16 the question to the panel. Anybody who says yes, I'm going to
17 ask is it on your supplemental questionnaire? If it is, I'll
18 have them sit down at that point. Those who haven't indicated
19 it on the questionnaire, I'll ask just enough to get specific.

20 But then with respect to these questions, do you feel
21 that we need to conduct individual voir dire on some of these
22 people or --

23 MR. MOSKOW: It may --

24 THE COURT: -- all of them or --

25 MR. MOSKOW: Your Honor, I believe it may be

1 appropriate. We believe it may be appropriate on individual
2 cases to inquire perhaps either at side bar or outside the
3 presence of the other jurors.

4 MS. JONES: We agree with that, Your Honor.

5 THE COURT: So here's what we'll do.

6 As I've indicated, we have the questionnaires. So
7 whether it's somebody with new information or somebody with a
8 questionnaire response, we'll just know who they are. And
9 then, once I've gone through all of the questions, we'll start
10 with Juror No. 1 -- I think I may have told you this has been
11 my practice for the last few years.

12 We will just start with Juror No. 1 in the conference
13 room, and I'll find out what inquiry you want to make of that
14 juror, and we'll bring them in and do it. Then we will go to
15 No. 2, 3, 4, 5, just down the line, and that will include
16 follow-up questions about any of the matters identified in the
17 jury questionnaire.

18 Okay?

19 MR. MOSKOW: Thank you, Your Honor.

20 THE COURT: All right. Then the preliminary
21 instructions, start with plaintiffs.

22 MR. MOSKOW: Thank you, Your Honor.

23 I think we have three -- no, it looks like we have two
24 on this issue as well -- or, no, three on this issue. So let
25 me start with paragraph A5a.

1 We would just ask for two changes in this paragraph.
2 First, plaintiffs make, not makes.

3 THE COURT: Okay.

4 MR. MOSKOW: And in the second sentence, we would seek
5 to substitute the word need for must. So it will read, you
6 need not automatically reach, as opposed to you must not.

7 THE COURT: All right. I'll do that.

8 MR. MOSKOW: Thank you, Your Honor.

9 With regard to the section on compliance with safety
10 standards, that is I believe on page 6 of your --

11 THE COURT: Okay.

12 MR. MOSKOW: Let me just -- just give me one second,
13 Your Honor. I'm sorry.

14 THE COURT: Page 8 of mine, the section compliance
15 with safety standards?

16 MR. MOSKOW: Yes, Your Honor.

17 THE COURT: All right.

18 MR. MOSKOW: So the plaintiffs' concern is essentially
19 with the last sentence, which repeats and restates what is
20 part of the pattern charge, but does so in a way that we think
21 is a statement beyond that which the law provides.

22 So we would either seek a striking of the last
23 sentence, or it be edited to read as follows: While
24 compliance with appropriate regulations is competent evidence
25 that BI exercised due care in the development and marketing of

1 Pradaxa, it is not conclusive on that issue, and you should
2 consider all of the evidence before reaching your conclusion.

3 MS. JONES: Your Honor, we are satisfied with the
4 Court's instruction as written on compliance with safety
5 standards. That final sentence is drawn verbatim from the
6 J.C. by and through Michelle C. versus Pfizer case, which is
7 240 West Virginia 571.

8 Item 3 in the syllabus by the court reads: Compliance
9 with the appropriate regulations is competent evidence of due
10 care. That is line for line what the law actually provides
11 for, so we don't think a qualification or adjustment is
12 necessary.

13 THE COURT: All right. I'm going to leave it as it is
14 for now. We'll make note of that. I might and probably will
15 revisit that when we get to final instructions.

16 MR. MOSKOW: Thank you, Your Honor.

17 THE COURT: All right. Is that it?

18 MR. MOSKOW: No, we have one last change, Your
19 Honor --

20 THE COURT: Okay.

21 MR. MOSKOW: -- or request, I should say.

22 This regards to conduct as jurors, No. 6 on page 9.

23 THE COURT: Okay.

24 MR. MOSKOW: At the risk of incurring the Court's
25 wrath, because it's clear that you have a desire that the jury

1 not take notes, the plaintiffs believe, given the substance
2 matter that is going to be discussed and the length of the
3 trial, it would be appropriate for the jurors to be able to
4 take notes, at least during the evidence portion of the case
5 if not during opening and closing.

6 THE COURT: All right. What do you say to that?

7 MS. JONES: We agree with that, Your Honor.

8 THE COURT: All right. This is just the standard
9 language.

10 I'll tell you that I generally don't like to have the
11 jurors try to take notes, but I think this trial falls within
12 the exception because of the length and nature of it. So what
13 I will do is rewrite this and make perhaps at least two or
14 three points.

15 One will be that I will allow any juror who wants to
16 take notes to do so. I will say don't feel obligated to take
17 notes. It's a question of whether it is your preference and
18 makes it easier for you to follow everything. And then some
19 form of warning to the effect that your notes should be just
20 for you, and other jurors shouldn't rely upon your notes,
21 something to that effect.

22 So we'll change the language a little bit. I'll try
23 to make sure you see that -- I will make sure you see that
24 before we do it in the morning. But with that, we'll let
25 jurors take notes if they so desire.

1 And the simplest way for us to do that is we will just
2 get a bunch of legal pads and pens and make them available to
3 the jurors, and we'll see what the jurors do with them.

4 I can't remember if you all talked about doing -- you
5 talked about doing final exhibit notebooks at the conclusion,
6 but you don't intend to do notebooks during the trial; is that
7 right?

8 MR. MOSKOW: Your Honor, what we'll do is we'll
9 publish exhibits as they're entered into evidence. I can
10 speak for the live witnesses that the plaintiffs will put on.
11 We will actually have notebooks for the witness, the Court and
12 opposing counsel so that there isn't a lot of running around
13 the courtroom with paper exhibits, but they will not go to the
14 jury.

15 And what has seemed to work for the parties so far is
16 that, you know, before closing argument, those agreed upon,
17 the final list of exhibits, those are put numerically in order
18 into binders, and those are available for the Court and the
19 jury.

20 THE COURT: All right. Very good.

21 All right. That's all of the objections, then --

22 MR. MOSKOW: It is, Your Honor. Thank you for your
23 consideration.

24 THE COURT: All right. Let's start with your
25 objections.

1 MS. JONES: Thank you, Your Honor. I guess we -- and
2 we did raise this with plaintiffs' counsel over the course of
3 the weekend.

4 We had a concern, and I suppose a more direct way of
5 saying it would be we have an objection to the level of detail
6 that is currently included in the instructions in terms of
7 laying out all of the elements of the claims for each of the
8 claims that exist. And I understand that this may well be the
9 Court's practice, but if I may, I'll just kind of explain what
10 our concerns are in this particular case with that approach.

11 The first is we expect that we will be making a motion
12 at the close of the plaintiffs' case for a directed verdict,
13 and we have some concerns about having a preliminary
14 instruction to the jury that goes through in a fair amount of
15 detail the elements for each of the claims when there is a
16 possibility -- and obviously we can't predict this, but -- a
17 possibility that all of those claims will not survive a motion
18 at the close of plaintiffs' case. That's one.

19 The second concern is really that some of the elements
20 that are laid out we think probably would be better explained
21 to the jury once the evidence has actually come in. And the
22 best example that I can point to is in the warranty claims,
23 there are certain instructions related to what the warranty or
24 the representation was that was made. I don't know that we
25 have a clear sense at the front end of exactly what the

1 evidence will be on that. I think as the instructions are
2 currently written, it suggests that the company made a
3 representation about the medicine being safe, which in a
4 prescription medicine case, it's a little bit in a posit just
5 because of the nature of prescription medicines.

6 So that's just a threshold, more of a global concern
7 that we have about the instructions as they're written.

8 What we had suggested to plaintiffs' counsel over the
9 weekend was a possible general statement of the case. We
10 certainly recognize the need to give the jury some sense of
11 what the facts will be. We certainly have no objection even
12 to laying out in a general way what the claims are that exist
13 at this point in the case, but we have some concerns about the
14 level of detail at which they are outlined in the
15 instructions.

16 To the extent that the Court is inclined to proceed on
17 this basis, then we have some more granular issues that we
18 wanted to raise, but I wanted to put that issue in front of
19 the Court.

20 THE COURT: Well, a fair matter for discussion. What
21 is plaintiffs' response to that?

22 MR. MOSKOW: So, Your Honor, I think the way you
23 stated that was absolutely correct, it was a fair matter for
24 discussion. And we said, when they brought it up, why don't
25 you put in writing what you're thinking. We looked at it, and

1 we looked at what you had done, and I think maybe we came to
2 the same conclusion that the Court has.

3 That given the nature of this trial, given the amount
4 of information that is going to be provided to the jury, that
5 giving them a road map as to why this information is relevant
6 or why they should be paying attention to particular things
7 will be helpful. And I think that's particularly true given
8 the number of claims here, that they have some understanding
9 of exactly what they're here for.

10 THE COURT: Well, I struggled with this.

11 I always tell lawyers that I prefer that the
12 preliminary instruction be brief and just provide the basic
13 context of everything for the jury. But when you start
14 looking at a case like this, the nature and number of the
15 claims, unless plaintiff is willing to agree to either delete
16 the references to each of the different claims or summarize
17 them in some different way, I think I have to state --
18 identify each claim and the elements of that claim. And if
19 there are things we can take out, excise to reduce this, that
20 would be great.

21 I'm really worried that this is just going to go right
22 over top of the jury, but I don't know that there is any
23 alternative at this point unless the parties come to some type
24 of agreement.

25 MR. MOSKOW: Your Honor, and maybe this would have

1 been helpful for me to say when I was standing up originally.
2 If I had turned the microphone on, that might have been
3 helpful as well.

4 But we anticipate that the first several witnesses
5 will be by videotape, so it will be, we think, particularly
6 helpful in that context for the jury to hear what is going to
7 come and then see the video.

8 THE COURT: Yeah.

9 Well, in any event, I think I'm going to have to deny
10 your general objection. I think that the Court has to
11 instruct, even in preliminary instructions, as to each of the
12 claims, and so I don't see any shortcut to that other than if
13 somehow the parties agree. So I guess we're going to have to
14 get into the detail somewhat.

15 MS. JONES: Okay. Understood, Your Honor.

16 We just wanted to make sure we noted that --

17 THE COURT: Sure.

18 MS. JONES: -- for purposes of the record.

19 How would you like us to proceed? Because we've sent
20 some red-line changes to plaintiffs' counsel. I'm happy to
21 walk through those. They're not incredibly detailed, but
22 there are several.

23 Would you like me to just go through these or submit
24 them --

25 THE COURT: I guess, first --

1 MS. JONES: -- for the docket?

2 THE COURT: -- I'd like to see the extent to which
3 there is agreement.

4 If the plaintiffs disagree with your recommended
5 changes, then we'll just have to go through them page by page
6 or section by section, which is fine with me.

7 MS. JONES: Do you all have a copy of what we sent
8 yesterday?

9 MR. MOSKOW: I have it, Your Honor.

10 Your Honor, plaintiffs have a general objection to the
11 changes. We might be able to wordsmith them as we go through
12 them with the Court, but --

13 THE COURT: All right.

14 MR. MOSKOW: -- there are a number of things that we
15 just don't think --

16 THE COURT: Then we'll just have to go through them.
17 And as far as I'm concerned, you know, just start with the
18 first page, and we'll --

19 MS. JONES: Okay.

20 THE COURT: -- see where that leads us.

21 MS. JONES: That sounds good.

22 Okay. The first section, A, General Instructions, we
23 have no issues there.

24 Section B, obviously subject to our objection earlier,
25 we have no issue with that brief little introduction.

1 As to the section on plaintiffs' causes of action --

2 MR. MOSKOW: Excuse me.

3 MS. JONES: Yes?

4 MR. MOSKOW: Would it be helpful to give the Court a
5 copy of it, and then -- we're okay if you want to provide --

6 THE COURT: If you've got a copy --

7 MS. JONES: I have a copy of the red line, if that
8 would be helpful to Your Honor.

9 THE COURT: Do you actually have two copies?

10 MS. JONES: Yes, I do.

11 THE COURT: Give one to Blake.

12 MS. JONES: May I approach, Your Honor?

13 THE COURT: Yes, you may.

14 THE CLERK: Thanks.

15 (Counsel conferring.)

16 MS. JONES: So I think we're on page 3, Your Honor,
17 where we didn't have any changes as you can see.

18 THE COURT: Okay.

19 MS. JONES: On page 4, the first substantive change is
20 in the third element regarding proximate cause, where it reads
21 that Pradaxa's defective warnings were a proximate cause of
22 Betty Knight's injury.

23 We have proposed that it also include the clause,
24 including her death. Given the claims in the case, that would
25 be consistent with what appears on page 6.

1 THE COURT: It makes sense to me, where it's a
2 wrongful death claim as well as an injury claim.

3 MR. MOSKOW: Our concern, Your Honor, is that it
4 appears in this case to be all inclusive as opposed to an
5 either/or, which is consistent with the rest of -- that's
6 where I was saying this is the type of thing we could
7 wordsmith --

8 THE COURT: Well, I mean, it says the warnings were a
9 proximate cause of injury, including death, so I'm going to
10 add the language that they are requesting.

11 MR. MOSKOW: That's fine, Your Honor.

12 THE COURT: Okay.

13 MS. JONES: Your Honor, that would address our next
14 edit, which is at the bottom --

15 THE COURT: I think it's the same, then.

16 MS. JONES: Yes.

17 On page 5, you'll see in our red line that we
18 essentially outlined in a little more detail some of the
19 elements that we believe are required to be proved in a
20 failure to warn case under the causation prong.

21 I'm not sure if plaintiffs have specific objections to
22 these that we should talk about or -- or if the Court has a
23 reaction.

24 THE COURT: Well, what does plaintiffs say about this?

25 MR. MOSKOW: A couple of things.

1 First of all, Your Honor, this goes down that slippery
2 slope that we just started. So it takes out the word injury
3 altogether, and now it's just talking about her death, so we
4 have a concern about that.

5 Second of all, and maybe I'm overstating this, but I
6 think part of what the Court was trying to do here was to
7 restate complicated legal principles in plain language to
8 people who are literally learning about this for the first
9 time. And I think the use of the language, you know, the
10 warning would have made a difference is essentially what we
11 need to prove in terms of causation here.

12 It may be appropriate at the end of the case to
13 provide more detail as to that issue, but what we're trying to
14 do here is get the jury in place.

15 THE COURT: I agree with the plaintiffs. I'm going to
16 deny your request with regard to these sections.

17 I guess the way you've divided these up, you've got a
18 vertical line on the side that kind of separates --

19 MS. JONES: Yeah.

20 THE COURT: -- the objections.

21 MS. JONES: The vertical line on the side I think just
22 indicates where there's a change.

23 THE COURT: Well, in any event, I do think that the
24 Court's original language is sufficient for preliminary
25 instruction.

1 And then just as an incidental note, in that last
2 sentence, it would be redundant to include the including her
3 death addition there. Because if I did your language, it
4 would say if Pradaxa didn't cause death, or if a warning would
5 have prevented injuries, including her death -- well, maybe
6 it's not the same.

7 But, in either event --

8 MS. JONES: So just a question, Your Honor?

9 THE COURT: All right. Here's what I'll do just to
10 make it simple.

11 MS. JONES: Okay.

12 THE COURT: I will add the including her death
13 language --

14 MS. JONES: Your original instruction --

15 THE COURT: -- to be consistent with the evidence, but
16 deny the balance.

17 MS. JONES: And just so I say it to be clear, Your
18 Honor, we have sufficiently preserved our objections for
19 purposes of arguing instructions at the close of the evidence,
20 I assume?

21 THE COURT: Absolutely.

22 MS. JONES: Okay. Thank you, Your Honor.

23 THE COURT: Okay.

24 MS. JONES: I think that takes us to page 6 and the
25 warranty instruction, and this was the point that I mentioned

1 earlier.

2 You can see we have proposed to eliminate the phrase
3 represented that Betty Knight could safely use Pradaxa, and
4 proposed to replace that with made a statement of fact about
5 Pradaxa. Excuse that extra A in the word Pradaxa there.

6 And we made a corresponding change in the second
7 element of that claim as well as including the including her
8 death clause at the end of the fifth element, which carries
9 over to page 7.

10 MR. MOSKOW: Your Honor, we like the way it was
11 written. We don't have a huge objection to these changes, but
12 we think as written it was appropriate.

13 MS. JONES: And our only view, Your Honor, was that it
14 would probably be better to state that more generically at
15 this stage in terms of what the alleged representation was.
16 And when we get to the closing instructions, then maybe it
17 would be an appropriate time to give further detail on that
18 point.

19 THE COURT: Well, I do think these are all subject to
20 being revisited. And as long as they're accurate, even though
21 more general, then the final instructions are likely to be --
22 I'm satisfied with them.

23 So I'm going to deny the first request -- or first
24 objection you have under the express warranty matters. But
25 then I'll add the including her death language on the next

1 page to be consistent. And likewise in the implied warranty,
2 No. 5.

3 MS. JONES: Thank you, Your Honor.

4 MR. MOSKOW: Thank you, Your Honor.

5 MS. JONES: The only other issue we had on implied
6 warranty was with respect to the third element that is
7 described here concerning promises or affirmations of fact.
8 And I think the original phrasing was made on the container
9 label or the Medication Guide.

10 We weren't clear on what exactly container was a
11 reference to, and I'm not sure, as a legal matter, that BI is
12 responsible for --

13 MR. MOSKOW: We have no issue with that, and we'll
14 note our objection for the record, but understand that
15 including death will be included in paragraph 5.

16 THE COURT: All right. I'll adopt the change proposed
17 by the defendant.

18 MS. JONES: Okay. Thank you, Your Honor.

19 Your Honor, subject to obviously our earlier objection
20 on the detail point, those are all the issues that we have
21 with respect to the preliminary instructions.

22 THE COURT: All right.

23 MS. JONES: Thank you for hearing us on that.

24 THE COURT: And then on the -- and we'll alter the
25 discussion about note-taking.

1 MS. JONES: Yes, Your Honor.

2 THE COURT: All right. So does that resolve all of
3 either side's objections to voir dire or preliminary
4 instructions?

5 MR. MOSKOW: For the plaintiff, it does, Your Honor.
6 Thank you.

7 MS. JONES: Also for the defense. Thank you, Your
8 Honor.

9 THE COURT: All right. The next note I had on my list
10 was any other matters under the joint proposed amended
11 integrated pretrial order. Is there anything else that we
12 need TO take up from that?

13 MS. JONES: I don't think so, Your Honor. I think we
14 have agreement that we will have an hour per side for
15 openings. I recall you saying you wanted us to try to achieve
16 agreement on that, and I believe that we have.

17 THE COURT: All right. And then I assume each of you
18 are going to use some type of presentation. So have you been
19 able to vet your opponent's presentations, whatever you're
20 going to use, whether it's a power point or actual exhibits or
21 whatever?

22 MS. JONES: We have a schedule in place as part of the
23 PTO where we will exchange slide very early in the morning,
24 and we'll obviously talk about any issues that we have. If
25 there is anything that needs the Court's attention, we'll

1 bring that to your attention.

2 THE COURT: All right. So at this point, there are no
3 other issues that the parties have identified that the Court
4 need address today?

5 MR. MOSKOW: May I have one moment, Your Honor?

6 THE COURT: Yes.

7 MR. CHILDERS: Your Honor, per your instruction, I
8 went and found some information about Dr. Connolly that I'm
9 happy to share with Your Honor.

10 THE COURT: Great.

11 MR. CHILDERS: First is the paper itself, once it was
12 published, that we -- may I approach, Your Honor?

13 THE COURT: You may.

14 MR. CHILDERS: Your Honor, this is the paper itself.

15 It shows that Dr. Connolly received -- is a
16 consultant -- received consulting fees and other honoraria
17 from Boehringer.

18 There is additional information in the deposition of
19 Jeffrey Friedman where he was asked specifically how much did
20 Dr. Connolly and the rest of his group, which is the PHRI, is
21 what they call them, get paid to do the work that they did.
22 And it was -- the answer was, it's probably, I would guess, in
23 excess of 50 million dollars.

24 So I think we've clearly established he got paid a lot
25 of money to do what he was doing by this company and,

1 therefore, I think he is an agent of the company for purposes
2 of what we seek to do.

3 MS. JONES: Your Honor, may I respond to that briefly?

4 THE COURT: Yes.

5 MS. JONES: So this paper is the exposure response
6 paper that you've obviously heard quite a lot about. And it
7 is an entirely mundane thing that doctors, like Dr. Connolly,
8 disclose when they are authors to this type of paper, I have a
9 relationship with the company, I've been paid by the company
10 at certain points. This is an entirely routine, entirely
11 proper disclosure.

12 If every time an outside scientist made a disclosure
13 like that, that person became an agent of the company for
14 purposes of the hearsay rules, it would blow open the
15 exception to the rule for party admissions.

16 The fact that Dr. Connolly may have received grants
17 from the company and may have disclosed that in the
18 appropriate course, as he was required to do by the journal,
19 certainly does not turn him into an agent. And the fact he
20 works for an institution that was part of a large clinical
21 trial, which happens all the time, does not turn him into an
22 agent of the company. What they're proposing would completely
23 eliminate the boundaries on the party admission rules.

24 THE COURT: Okay. You want to reply?

25 MR. CHILDERS: Your Honor, he got paid fifty -- his

1 group, including him, got paid 50 million dollars to run this
2 study for the company. He became an agent of theirs and then
3 wrote this paper along with them, with their employees and the
4 other folks at his institute. They got the 50 million
5 dollars. I think that satisfies the issue of whether or not
6 he was an agent for this purpose.

7 THE COURT: Well, I have to say looking at this, to me
8 it's a little more ambiguous about whether he was being paid
9 by BI for this work, and I'm not sure that the part that
10 you've highlighted convinces me that that is the case.

11 It certainly would be appropriate for any author in a
12 peer-reviewed article to identify any past as well as current
13 connection with someone whose product is under the analysis.

14 What I'm interested in, and I don't know if you can
15 answer this, but that bottom footnote, if that's what it is,
16 starts off with the sentence from departments of clinical
17 development, and then there is an asterisk.

18 And so does that asterisk refer to --

19 MS. JONES: It reflects --

20 THE COURT: -- connect the authors listed above to
21 that asterisk?

22 MS. JONES: Yeah, so all these little figures here
23 match up with the ones at the bottom. So that asterisk at the
24 bottom matches up with Paul Reilly's name as well as Susan
25 Wong's name. You'll see that later in the list of authors.

1 And then if you look at Dr. Connolly, he has a
2 different indicator for his affiliation with Population Health
3 Research Institute, McMaster University.

4 So those little symbols just indicate the affiliations
5 of the authors.

6 THE COURT: Yeah, I don't think this is enough to
7 convince me that Dr. Connolly was an agent of BI at the time
8 he made these statements sufficiently that the statements
9 could be attributed to BI.

10 So I've forgotten what the context was.

11 MS. JONES: I think that was our motion, Your Honor.

12 THE COURT: I think I was granting the defendant's
13 objection.

14 Do you want to put this in the record as part of
15 this --

16 MR. CHILDERS: Sure, Your Honor. And I would also
17 just point out -- we've been trying to pull these up, and we
18 haven't gotten them all.

19 Dr. Connolly also has specific service agreement
20 contracts with BI during this entire time period, and I'm
21 happy to provide those to Your Honor tomorrow. I just can't
22 print them out here in the courthouse.

23 This guy is working for the company. Whether he's at
24 another institute doing it or not, he's working for the
25 company.

1 THE COURT: Well, if you've got something that you
2 think materially changes the application of my analysis, I'm
3 happy to look at it and consider it. I'm skeptical, but I'll
4 let you present whatever you come across.

5 So Plaintiffs' Exhibit 3247 -- boy, that's alarming.
6 We haven't even started trial, and we are already on Exhibit
7 3247. In any event, it's made a part of the record of this
8 pretrial or final settlement conference.

9 All right. Then is there anything else that you all
10 have that you want to discuss before I get to some of these
11 mundane matters?

12 MS. JONES: This may be a mundane matter, Your Honor.

13 Just for purposes of opening, is it acceptable to the
14 Court if counsel -- obviously we are not going to be running
15 around the well, but -- step away slightly from the podium to
16 use a board? Is that okay?

17 THE COURT: Yes. And if you'd like, and I would
18 suggest if you are going to be up there for an hour, we can
19 rotate that podium.

20 MS. JONES: Okay. Terrific.

21 THE COURT: So just remind us in the morning. It
22 takes a couple of people to turn it kind of carefully. There
23 are plug-ins underneath it, so you have just got to be careful
24 that we don't accidentally unplug something or put counsel in
25 a position where they're going to be standing next to a plug

1 they might accidentally hit or kick or something.

2 MS. JONES: Thank you, Your Honor.

3 THE COURT: Yes. You can use that.

4 I will remind you that because the acoustics are not
5 very good in here, my court reporter has to depend upon the
6 microphone system. So when you step away, make sure that you
7 speak loud. I think you all are experienced trial lawyers, so
8 that is probably a natural for you.

9 Unfortunately, whether it's lack of experience or
10 whatever, many lawyers get here in the courtroom and talk so
11 quietly even with the jury that it is hard for us to hear, and
12 there is just no way my court reporter can hear that when
13 she's trying to listen through the system.

14 So that reminds me of a couple of points.

15 One, we'll probably have numerous bench conferences.
16 When we do that, I like the plaintiffs to come on this side,
17 the defense to come on the other side, so my court reporter
18 can get here in the middle if she wants to.

19 She's got now a recording device, which is keyed to
20 this bench microphone, and this bench microphone doesn't
21 broadcast over the system, so she just hears that. So if this
22 works, she may not have to relocate, which will be great.
23 Because if she has to move in the middle to hear you folks, it
24 becomes really difficult.

25 And so we're going to try to use the recorder, but it

1 will be difficult for her to keep up with it on a real-time
2 basis if she has to depend upon listening to the recorder. So
3 we'll just see how it goes. We are going to play with this
4 thing later today, and hopefully I can tell you tomorrow that
5 when we have bench conferences, she won't have to relocate and
6 move to the middle, and you can crowd up here with me. And
7 I've got the courtroom microphone here, which I'll just turn
8 off.

9 Also, we do have the white noise feature, and we'll
10 use that probably every time if I can remember to direct
11 somebody to turn it on.

12 Also, you all have asked for daily transcripts or at
13 least one side has, I guess.

14 Are both sides doing that?

15 MR. MOSKOW: I believe the defense has, Your Honor.
16 The plaintiff hasn't.

17 THE COURT: So we've got one of our colleagues in the
18 Charleston division who is going to be here. She and our
19 court reporter have worked out a schedule. They're each going
20 to do quarters each day and alternate so we can work on this.

21 I think I can speak for both the court reporters,
22 they're very nervous about being asked to do a read back of a
23 question or an answer if we get into that situation with a
24 witness where, because of an objection or something or for any
25 other reason, counsel says can you read that back to me. So

1 try to minimize that. We'll depend upon you to try to restate
2 those things, and don't expect that if you've lost your train
3 of thought that we're going to be able to necessarily come to
4 your rescue with a read back.

5 I've got the realtime. I don't mind summarizing
6 things. But, you know, I just want to make clear that we're
7 probably going to ask that you not ask the court reporters to
8 literally read back a question or an answer.

9 And then with regard to the daily transcripts, I don't
10 know that I've actually had a trial where one side has asked
11 for that. I don't remember offhand. I don't know what you
12 expect to do with that daily transcript, if anything, other
13 than for your own purposes.

14 Do you purport that that becomes an official
15 transcript, and that you could use that -- obviously not for
16 the jury, I guess, but be quoting from that as an official
17 transcript during questioning of other witnesses or argument
18 with the Court? I don't know what you plan to do with it.

19 MS. JONES: I can tell Your Honor, just based on our
20 experience in the earlier trials, that usually part of it is
21 just for our internal purposes for preparing for other
22 witnesses, preparing for closing.

23 THE COURT: Right.

24 MS. JONES: To some extent, we probably have relied on
25 daily transcripts for purposes of arguments that have come up

1 during the course of the trial. I don't think we've done that
2 extensively or excessively, but I think that has been the case
3 to some extent.

4 I'm not sure that there have been many, if any,
5 examples of places where we've used a daily trial transcript
6 with a witness on the stand, and I'm not readily coming up
7 with something where I would expect that to happen. But those
8 are the general buckets of how we've used them in the past.

9 THE COURT: Well, I'm going to talk with my court
10 reporters this afternoon and see how they view these daily
11 transcripts. I have always presumed that because it is such a
12 quick turnaround, that they are not considered official
13 transcripts. They're not filed and docketed by the Court as
14 the official transcript. And if that's the case, then I'm
15 probably going to be very hesitant to let you read from a
16 daily transcript in questioning a witness.

17 I guess, you know, if it's argument of motions and
18 things like that or issues with the Court, I guess I don't see
19 the official -- or the unofficial transcript that you have as
20 being much different from somebody's notes or best memory, and
21 so I don't know that I have a problem with that.

22 Mostly I'm hesitant to make the jury aware of these
23 daily transcripts because, as a matter of routine, I instruct
24 jurors that they should not expect to have a transcript of any
25 of the witness testimony for the purposes of their

1 deliberation. Because obviously in the vast majority of
2 cases, we don't have any kind of transcript, and certainly not
3 an official transcript, and so I don't know that there's any
4 reason to believe that this would be any different.

5 But if you think that there is a different or more
6 complete use of the daily transcript, let the plaintiffs and
7 the Court and the court reporter know that before we get into
8 an issue. Okay?

9 MS. JONES: We're happy to be guided by whatever Your
10 Honor prefers.

11 The one example that did come to mind for me in terms
12 of witnesses that we sometimes have given the daily transcript
13 to is an expert who we are calling later, and we might ask the
14 person, when we present that witness, did you have a chance to
15 review the testimony of so and so? Beyond that, we don't use
16 the transcripts for any purpose during examination. But in
17 the interest of just giving Your Honor a sense of how it might
18 have come up in the past, that is one example.

19 THE COURT: Well, in the instance you've identified
20 with an expert, then, you would purport to consider giving an
21 expert a daily transcript of a prior witness's testimony when
22 they were not present to hear that testimony?

23 MS. JONES: Correct. For example, with experts who
24 just aren't able to be here every day of the trial who
25 obviously would be entitled to be in the courtroom while other

1 folks are testifying. I think it's mostly come up with
2 physician experts.

3 THE COURT: You all have a concern about that?

4 MR. CHILDERS: The only concern I would have, Your
5 Honor, is if they're quoting it or something along those
6 lines. The jury will remember whatever they remember from the
7 testimony, but I don't mind them looking at it.

8 THE COURT: All right. Well, we'll see if we
9 encounter that. Obviously I don't want the jury to be misled
10 by the availability of a daily transcript, and it might be a
11 little bit problematic if I let you use those openly and quote
12 from them or have a witness quote from them and then at the
13 end of the evidence tell the jury they can't see these
14 transcripts. So that would be a concern.

15 All right. Is there anything else that you all have
16 identified that we need to take up?

17 MR. CHILDERS: Your Honor, may I just ask one question
18 about procedure?

19 In terms of moving the transcripts from the video
20 plays and the exhibits that are referenced in them, those will
21 be done by agreement of the parties. Is it your preference to
22 do that in front of the jury or outside the presence of the
23 jury? Because they are transcripts, and you don't want to
24 talk about transcripts.

25 THE COURT: My preference would be to do that outside

1 the presence of the jury. The jury doesn't need to hear that
2 or be delayed with whatever they're doing.

3 MR. MOSKOW: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. CHILDERS: Just so I'm prepared for tomorrow, how
6 are we going to sort of logistically do this with the jury?
7 Are they coming in the back here?

8 THE COURT: Here's how we do it.

9 So I think --

10 (Off-the-record discussion with courtroom deputy.)

11 THE COURT: So we have between 30 and 35 people. They
12 will show up downstairs. When they come in downstairs, they
13 will be checked off by the clerk's office. The clerk
14 downstairs will randomly by computer assign a number to each
15 juror, 1 through -- I guess we will have 32 since we're
16 excusing those three. I think that's the right number.

17 What we tell the clerk's office is how many we want to
18 show up, so usually they'll ask -- they'll have a few more
19 than that because almost invariably we have somebody who
20 either is really late and we don't want to wait or, for
21 whatever reason, just didn't get the word. That does happen
22 legitimately unfortunately sometimes.

23 In any event, they'll show up. They'll each be given
24 a number. They will have a sticker with that number that will
25 be marked. And then when they're all assembled and ready to

1 go, the clerk's office will notify us. We'll be waiting for
2 them. They're usually pretty efficient. So pretty close to
3 9:00 or maybe 9:10, we should have them all down in the
4 clerk's office.

5 The clerk will then bring us, first, that numerical
6 list that will have the juror's name, address, and I think
7 maybe it lists their occupation. And then on the right side
8 is a column where our form has a blank space for different
9 objections, for cause, plaintiffs' peremptory, defendant's
10 peremptory, and you'll be able to use it for that. So that
11 list will accompany the jury up here.

12 So when we're told they are coming up, I will let you
13 know and expect you to realize that we've got jurors filtering
14 into the courtroom. It takes them a few minutes to get up
15 here. Some people will take the steps and be here quickly.
16 Some people will take the elevator. You know, it seems like
17 they trickle in.

18 When they come in, we'll have them seated in that
19 numerical order in the jury box and in the bench seats out
20 there. You'll have that list that shows their name, their new
21 number, and have a space for you to mark any excused or
22 removal of that juror from the list, and then we'll get
23 started.

24 As I told you, I think we'll end up probably spending
25 a good part of the morning in the conference room doing this

1 individually, and then we'll see where we go. It's six to
2 twelve people. I think we will probably have a jury of eight
3 or nine. And honestly whether it's even an number or an odd
4 number depends upon how many we have left when we start
5 peremptory challenges. We will just divide those up evenly
6 and let the parties go to it.

7 Usually when I do these peremptory challenges, because
8 you will get more than one or two, I'll see how many we have.
9 If each side is going to have -- each side could have as many
10 as eight or ten peremptory challenges. Whatever that number
11 is, if it is a number like that, I'll tell you at the time
12 we're going to do this in two or three -- well, in three
13 rounds. So if you've got eight challenges, you might have to
14 do three, three and two; you might have to do three, three and
15 two. It will be same, whatever it is. But we will do that in
16 two or three rounds, probably three rounds instead of one at a
17 time. It just goes faster.

18 MR. LEWIS: Is that done in open court, Your Honor?

19 THE COURT: Yes.

20 MR. LEWIS: Okay.

21 THE COURT: Once we finish all of the voir dire -- I
22 assume we'll be in there when we finish -- we will come out
23 here. We will formally convene. I'll tell the jurors that we
24 have completed the voir dire. Now the parties are going to do
25 their peremptory challenges.

1 At that point, I will tell the jurors that I'm going
2 to excuse the parties and let you leave, go to a conference
3 room or somewhere else to huddle up separately and talk about
4 what your strategy is. I will give you maybe five or ten
5 minutes to do that, and then bring you back in here, and we'll
6 start those peremptory challenges and exchanges.

7 I tell the jurors generally that when they are
8 waiting, that while we're technically still formally in court,
9 that they can stand up, move around a little bit. They can
10 talk to each other as long as they are not talking about
11 anything about the case or the process, go to the restrooms,
12 which are in here, if they need to. But I generally try to
13 keep them at or around their chair, partly so you can put a
14 face with a name. We'll give you a few minutes between the
15 close of all that voir dire and the start of the exchange of
16 peremptory challenges.

17 MR. CHILDERS: Your Honor, the challenges, will they
18 be, Juror No. 1, does either side have a challenge or --

19 THE COURT: No.

20 MR. CHILDERS: We can pick any --

21 THE COURT: You can pick anyone.

22 We'll have up to 32 people. And if nobody is released
23 for cause, then we'll probably have an eight-person jury, and
24 that's 24 that will have to be struck. I'll give each side
25 12, and you'll take turns marking your challenges off of that

1 whole list of 32 people.

2 MR. CHILDERS: Sorry. I misunderstood.

3 I thought there were three different groups --

4 THE COURT: Well, not three different groups.

5 You're going to get to do three series of challenges.
6 So if you've got 12 strikes, I'm going to tell you do four in
7 your first round, and then they do their four, do four in your
8 next, like that. That's all I meant by that.

9 MR. CHILDERS: Understood.

10 THE COURT: But it can be anybody on that list.

11 MR. CHILDERS: Okay. Thank you, Your Honor.

12 MR. MOSKOW: May I just ask, will for cause challenges
13 be done on the record or --

14 THE COURT: Yes.

15 MR. MOSKOW: Thank you.

16 THE COURT: What I prefer to do is when we're doing
17 this individual voir dire, and I'm sure we'll do individual
18 voir dire of probably anybody that either side is going to
19 want to strike for cause, as soon as they walk out of the room
20 is your time to -- and I'll point that out. That's when
21 either side or both can speak up about a challenge for cause.

22 I don't tell the jurors they're excused until we deal
23 with all of them.

24 MR. MOSKOW: That's fair.

25 THE COURT: I don't want there to be a mad rush to the

1 doors. So I just tell even jurors that -- I might say -- if
2 somebody has got some obvious logistical problem that is going
3 to require me to excuse them, and you all agree, and you've
4 discussed that, I'll tell them, well, you're going to stay
5 seated until we excuse everybody together just so we don't
6 start having people dribble out one at a time.

7 And the only reason I do that is I've found in the
8 past, if somebody gets excused like that, then other people
9 start saying I've got something, too. So, anyway, that is
10 generally how we handle it.

11 I guess you have already figured out where you can --
12 the room you can use for staging for when it's your case.

13 Any different estimate about how long it's going to
14 take for you to put on your evidence?

15 MR. CHILDERS: I still think we'll be done before
16 three weeks, Your Honor, with the whole trial, like I told
17 Your Honor the last time we were here.

18 THE COURT: Right.

19 MR. CHILDERS: Whether it's two weeks or two weeks and
20 change, I couldn't --

21 THE COURT: Okay. Same for you folks?

22 MS. JONES: Same for us, Your Honor.

23 THE COURT: All right. How many of you are going to
24 be here? How many lawyers are you going to have here at
25 counsel table? Everybody, everybody who is here now?

1 MS. JONES: No, the whole gang will not be here every
2 day. It will be Mr. Lewis and Ms. Callas and myself at
3 counsel table.

4 THE COURT: Okay.

5 MR. CHILDERS: Two of us, Your Honor. And Mr. Knight
6 will be here most days, and Ms. Stevens will also be here.

7 THE COURT: Okay.

8 MR. CHILDERS: Then Mr. Abney may -- if he is going to
9 handle a witness, we'll swap out.

10 THE COURT: All right. Is there anything else?

11 If not, be back here at 8:30 in the morning, and we
12 should be good to go.

13 MS. JONES: Okay.

14 THE COURT: See you in the morning.

15 MR. CHILDERS: Thank you, Your Honor.

16 MR. MOSKOW: Thank you, Your Honor.

17 MS. JONES: Thank you, Your Honor.

18 MR. LEWIS: Thank you, Your Honor.

19 (Proceedings were adjourned at 12:06 p.m.)

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1 CERTIFICATION:

2 I, Kathy L. Swinhart, CSR, certify that the
3 foregoing is a correct transcript from the record of
4 proceedings in the above-entitled matter as reported on
5 October 1, 2018.

6
7
8 October 10, 2018

9 DATE

10 /s/ Kathy L. Swinhart

11 KATHY L. SWINHART, CSR
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